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THE CONDUCT OF AMERICAN FOREIGN RELATIONS

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THE CONDUCT OF AMERICAN FOREIGN RELATIONS

BY

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WITHDRAWN

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TO
MY PARENTS

PREFACE

Despite its growing importance as a world power, the United States was still, at the outbreak of the Great War, largely self-centered and provincial. Speaking broadly, this condition no longer exists; notwithstanding a certain reaction against world policies, people are more interested today than ever before in all that concerns our foreign relations. Most of the books dealing with the foreign affairs of the country have treated the subject historically, and have, therefore, placed the emphasis on events, often presented in chronological sequence. The aim in the present work has been, rather, to discuss the subject from the standpoint of political science. Hence the treatment is topical rather than chronological; diplomatic events as such are introduced only incidentally to illustrate the principles and problems considered. Emphasis is placed upon the organization of the government for the conduct of foreign relations, the control exerted by its various branches therein, and the methods of procedure followed. To some extent these matters are regulated by the written constitution and laws. But they are also governed in part by unwritten "conventions." Accordingly, this book is a study in both constitutional law and constitutional practice, as affecting this phase of our governmental organization and activity. In this field, as in others, law and practice are slowly, but constantly, changing. Particular attention, therefore, is given to the important developments of the past few years, which have thrown much new light upon different phases of our foreign relations.

The present work is the outgrowth, in part, of an under-

graduate course on the subject which I have given for several years at the University of Illinois and, in part, of a series of lectures which I delivered during the winter of 1919-20 before the graduate students in political science at the Johns Hopkins University. I am deeply indebted to my former colleague, Professor E. S. Corwin, of Princeton University, whose excellent essay, *The President's Control of Foreign Relations,* has been of great service. My thanks are due also to Professors W. W. Willoughby, of the Johns Hopkins University, and P. B. Potter, of the University of Wisconsin, for helpful suggestions; while to Professor Frederic A. Ogg, the editor of the series in which the volume appears, I am under the deepest obligation for invaluable criticism and advice, which have improved the quality of the book throughout. For the volume's imperfections, however, I am, of course, alone responsible.

The substance of Chapters II, III, and XVII has appeared in the *Michigan Law Review* for May, 1919, and May and June, 1921, and I am grateful to the editors and publishers of that journal for permission to reprint the articles in this volume.

J. M. Mathews

University of Illinois,
August 1, 1921.

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THE CONDUCT OF AMERICAN FOREIGN RELATIONS

THE CONDUCT OF AMERICAN FOREIGN RELATIONS

CHAPTER I

THE BASIS AND MODES OF CONTROL

A NATION'S foreign relations may be considered from two main points of view: (1) the formation and content of policies, and (2) administration, *i.e.*, the agencies and modes of conduct and control. From the first point of view, the chief matters of concern are the interplay of forces which gives form to foreign policies, together with the nature, persistence, and readaptations of these policies. From the second point of view, interest centers in the machinery employed in the carrying on of foreign relations, in the methods pursued, and especially in the relative degrees of control exercised by the several organs of government over the different processes involved. Whether the United States shall be at war or at peace; whether it shall recognize a revolutionary government in Mexico, or use its influence to maintain the territorial integrity of China; whether it shall become a member of a general association of nations—these are questions of policy. Public opinion may demand war, or recognition, or a firm stand in the Far East, or membership in an association. But not until the appropriate governmental authorities take the necessary action can this opinion be carried into effect. Who shall interpret, who shall lead, public opinion in determining the policies to be pursued, and who shall execute the policies thus arrived at—these are questions of administra-

tion and control. In some instances, as we shall see, one branch of government determines what the policy shall be, while another executes it. But as a rule the same authorities determine the policy and also execute it.

In this volume we are concerned primarily with matters pertaining to the conduct and control of foreign relations, and only incidentally with the content of foreign policies.

On account of the largely separate and independent position assigned to the different organs and departments of government, the conduct of foreign relations in the United States is unusually complicated. In other countries, as a rule, this function belongs almost entirely to the executive. The adoption of such a plan here, however, was considered dangerous by a majority of the members of the Constitutional Convention of 1787, as it seemed to savor too much of monarchy. In the absence of any distinct executive department, foreign relations prior to 1789 were managed by the Continental Congress and the Congress of the Confederation; and this created a precedent for the handling of such matters by the legislative department. Experience under the Articles, however, showed that simple Congressional control of foreign relations was undesirable. Accordingly, the framers of the Constitution provided for a division of this control between the President, the Senate, and Congress. The courts, in construing the laws, might also incidentally affect foreign relations.

PRESIDENTIAL INITIATIVE

The power of taking the initiative in the formulation and announcement of foreign policies is not expressly conferred by the Constitution upon any particular organ of the Government. That this power is largely in the hands of the President is, however, inferable from the constitutional provisions expressly vesting in him the power to nominate and to receive diplomatic representatives, to participate in

the making of treaties, and to give Congress information upon the state of the Union. Not only the language of the Constitution, but also the practice of more than a century, establishes the principle that this power rests mainly in the President. Generally, although not invariably, the power of initiative and the power of control go together. The President, then, is in primary control of our foreign relations, and he exercises full authority throughout this entire field, except in so far as the Constitution expressly admits other agencies to a share in this authority, as is seen in the participation of the Senate in the making of treaties and the appointment of diplomatic representatives and of Congress in a declaration of war.[1]

The power of taking the initiative in formulating foreign policies is one which the President has frequently exercised. Washington's farewell advice to his fellow-citizens "to steer clear of permanent alliance with any portion of the foreign world," and the practical application of his policy of aloofness from "controversies, the causes of which are essentially foreign to our concerns" in the issuance of his neutrality proclamation of 1793 have had a potent influence throughout our history. The best-known example, however, of Presidential formulation of foreign policy is the Doctrine of Monroe, which was promulgated in his annual message to Congress in 1823.[2] The principle laid down by Monroe has been elaborated and expanded to meet new conditions in the official utterances of later Presidents, including Polk, Grant, Hayes, Harrison, Cleveland and Roosevelt. In the words and actions of the last two Presidents mentioned, the Monroe Doctrine assumed a more positive and

[1] Cf. the argument of Hamilton in 1793 regarding the power of the President to issue a proclamation of neutrality. *Works* (Lodge ed.), IV, 135 ff. See also Butler, *Treaty-Making Power*, II, 357-60.

[2] It is frequently stated that the person most concerned in the authorship of the doctrine was Monroe's secretary of state, John Quincy Adams. Even if true, however, this would not affect the fact that the secretary was acting as the agent of the President, and that the latter assumed the official responsibility of enunciating the doctrine and transmitting it to Congress.

aggressive tone and, in the twentieth century, it came to be known as the policy of the "Big Stick" or the exercise of international police power.[1] Finally, President Wilson, in an address to the Senate on the terms of a possible cessation of the Great War, proposed that "the nations should with one accord adopt the doctrine of President Monroe as the doctrine of the world." [2]

The Monroe Doctrine, which is probably one of the three most important political ideas that have played a part in the development of the nation, was thus the exclusive product of executive initiative in foreign policy and did not receive official recognition by Congress until seventy-three years after its original promulgation by the President. It is true, however, that the Presidents have deemed it desirable to secure the support, and at least the tacit approval, of Congress for policies enunciated, and for this reason they have usually announced their views and policies on foreign affairs in addresses or messages to that body.

The President's power of formulating policies would not be of such great importance if he did not also have considerable control over the execution of the policies formulated. Through his power of shaping and enunciating foreign policies, he may virtually commit the nation to such policies, at least in a moral sense.[3] To him is also entrusted, in large measure, the execution of these policies through the exercise of his diplomatic, military and general executive powers; although it is desirable that Congress should be consulted, because, in the execution of such policies the coöperation of that body may sometimes be essential. Some of the policies announced by the President may contain the seeds of war, and if hostilities break out, the action of Congress is necessary for the declaration of war

[1] See Roosevelt's fourth annual message, December 6, 1904.
[2] Address to the Senate, January 22, 1917.
[3] Cf. Taft, *Our Chief Magistrate and His Powers*, 113-4; Wilson, *Constitutional Government in the U. S.*, 77-8.

and for its prosecution, although, as will be pointed out,[1] the President very largely controls the determination of the question as to whether there shall be peace or war, and may manipulate the situation, through the exercise of his diplomatic and military powers, so as practically to compel Congress to declare war.[2] Some of the policies enunciated by the President may, furthermore, require for their fruition the making of international agreements to which the consent of the Senate is necessary, and this, as will be shown, is a more vital check upon the President's control of foreign policy than is the power of Congress to declare war.[3] In the address of President Wilson to the Senate, cited above, he stated that he addressed that body "as the council associated with me in the final determination of our international obligations." It is true, however, that the President's object in this address seems to have been rather to inform the Senate as to policies decided upon than to consult with that body as to what policies should be adopted.

Not only does the President frequently recognize the desirability of Congressional and Senatorial support in order to bring his general foreign policies to fruition, but he at the same time recognizes the necessity for the support of public opinion. Hence, an address to Congress is usually also an address to the people. Indeed, by winning popular support for his views on questions of foreign policy, the President may sometimes bring about desired action on the part of even an unwilling Congress. President Roosevelt achieved some notable triumphs in this way. President Wilson also met with considerable success, at least during his first administration, in marshalling public opinion so as to assure the Congressional coöperation which he deemed

[1] See Chap. XVI.

[2] On the other hand, however, it is true that the President has sometimes been practically forced into war, as in 1812 and 1898, through the bellicose attitude of Congress.

[3] President Roosevelt, however, in the Santo Domingo affair of 1905 was able to carry out his policy through an executive agreement without the consent of the Senate.

necessary in carrying out his foreign policies. Notable examples of this were the compliance by Congress with his requests for the repeal of the act exempting American coastwise vessels from the payment of tolls in passing through the Panama Canal and the tabling of the McLemore resolution requesting the President to warn American citizens against traveling on armed belligerent ships.

Indirect communication by the President of his foreign policy, such as we have been discussing, though usually general in character, may sometimes be directed towards some particular foreign government. In his annual message to Congress, the President, in pursuance of his constitutional duty to give that body information of the state of the Union, frequently dwells at length upon the state of our relations with various foreign countries, and sometimes announces the policy which he intends to pursue towards some particular country. Thus in his first annual address to Congress, in December, 1913, President Wilson declared, with reference to Mexico, that "we shall not, I believe, be obliged to alter our policy of watchful waiting." The President may also sometimes announce a policy directly to a particular country and at the same time inform Congress of his decision. Thus, as the result of the *Sussex* affair in 1916, President Wilson notified Germany directly that, unless she should immediately declare and effect an abandonment of her methods of submarine warfare, our Government would be constrained to sever diplomatic relations with Germany, and on the following day, in an address at a joint session of Congress, he informed that body of his decision.

The President is sometimes constrained to use the indirect method of announcing his policy towards a particular foreign country, not only from a desire to transmit to Congress information in regard to the matter, but also because direct communication with the country in question has been

cut off through the severance of diplomatic relations.[1] Thus, in an address at a joint session of Congress, January 8, 1918, President Wilson outlined the program upon which he would consider peace with Germany, as embodied in the famous "fourteen points," and, in the following October, Germany formally accepted these points as a basis for peace negotiations. Here, as in the case of the President's address to the Senate, cited above, his object appears to have been to inform Congress, as well as Germany, of the program decided upon, rather than to consult Congress as to the terms to be adopted. That the President alone could not, however, finally commit our Government to the terms of his peace program, in so far as they were embodied in the Treaty of Versailles, was shown by the Senate's rejection of that treaty.

Even though diplomatic relations are not severed, there may be a decided advantage in favor of the method of indirect communication through a message or address to Congress. Indeed, information as to the policy of our Government may generally be communicated in this way with little loss of effectiveness and without incurring the possible embarrassments of a diplomatic note. Thus, in his annual message of December, 1834, President Jackson declared that if France continued to delay the execution of the convention of 1831, the United States ought to take redress into its own hands. The President subsequently declined to give the French Government any explanations of his message, partly on the ground that "the right of a foreign government to ask explanations of or to interfere in any manner in the communications of one branch of the Government of the United States with another could not be admitted."[2]

The President sometimes enunciates his foreign policies

[1] Indirect communication, of course, may usually still be carried on through third states, which have proffered their good offices for this purpose.

[2] J. B. Moore, *Digest of Internat. Law*, VII, 125. This point has been further brought out in other instances. *Ibid.*, IV, sect. 671.

in addresses to bodies other than Congress. Thus, President Wilson, in an address to the Southern Commercial Congress, declared that the United States "will never again seek one additional foot of territory by conquest."[1] Again, his Flag Day address of 1917 to his fellow citizens was at once an exhortation to the people and an announcement to the enemy and to the powers with which we were associated of our determination to prosecute the war to a successful conclusion.

A phase of our foreign policy which has had a very important influence upon our national development is the acquisition of territory. In this respect, also, the President has generally taken the initiative. This is due in part to the fact that most of the territory acquired since 1789 has been obtained through the exercise of the treaty-making power, in which the President assumes the rôle of negotiator. Thus, in spite of his scruples as to constitutional power, Jefferson led in making the treaty of 1803 with France for the annexation of Louisiana.[2] Again, President McKinley and the commissioners whom he appointed to negotiate the treaty of 1898 with Spain assumed the initiative, as the representatives of the victorious power, in demanding the cession of the entire Philippine archipelago instead of merely the island of Luzon. Furthermore, in one case, territory was acquired by the United States by means of a simple executive agreement, without submission of the question to the Senate. This was done in the case of Horse-shoe Reef in Lake Erie, which was ceded by Great Britain in 1850.[3] In most of the cases in which ter-

[1] Address at Mobile, Ala., Oct. 27, 1913, Sen. doc. 226, 63rd Cong., 1st sess., p. 5.

[2] "The Executive," said Jefferson, "in seizing the fugitive occurrence which so much advances the good of the country, has done an act beyond the Constitution." *Writings*, IV, 500.

[3] Malloy, *Treaties*, etc., I, 663. The conditions attached to the cession were that the United States should erect a lighthouse on the reef, but should not erect fortifications. This was, of course, uninhabited territory.

ritory has been acquired, an appropriation by Congress has been necessary to complete the transaction, and the President has sometimes requested and secured such an appropriation in advance.

The initiative assumed by the President in the acquisition of territory may sometimes arise, not from his rôle as negotiator of treaties, but from his general control of foreign policy. This was shown by the annexation of Texas, to which Presidents Tyler and Polk were committed.[1] In this instance the treaty providing for annexation failed in the Senate and Texas was brought into the Union by joint resolution of Congress. The Hawaiian Islands were also annexed by the same method, although President Cleveland had prevented the annexation from becoming an accomplished fact during his second administration by withdrawing from the Senate a treaty for that purpose which had been submitted by his predecessor. That the President is not always able to carry into execution his policy regarding the annexation of territory is indicated by the failure of President Grant to consummate his cherished design of bringing about, either by treaty or by Congressional resolution, the annexation of Santo Domingo. This failure was probably due as much to political hostility to Grant in the Senate as to opposition to the annexation project *per se*.[2] It is to be noted, however, that both Santo Domingo and Haiti have been transformed into quasi-protectorates of the United States through the positive and aggressive

[1] Reeves, *American Diplomacy under Tyler and Polk*. For President Polk's attitude on a territorial indemnity from Mexico, see Richardson, *Mess. and Pap. of the Presidents*, IV, 537-8.

[2] In this connection mention should also be made of the action of Congress in regard to President Wilson's request for authority to assume a mandate over Armenia. In a communication to Congress, dated May 24, 1920, the President said: "In response to the invitation of the council at San Remo, I urgently advise and request that the Congress grant the Executive power to accept for the United States a mandate over Armenia." Congress, however, respectfully declined to grant the authority requested. Cong. Record, May 24, June 1, 1920, pp. 8138, 8693.

application of the Monroe Doctrine carried out on the initiative of the President during the administrations of Roosevelt and Wilson.[1]

In a number of cases, the Supreme Court has recognized the authority of the President to determine political questions connected with our foreign relations. For example, when the Executive denied the jurisdiction which Argentina had assumed to exercise over the Falkland Islands, the Supreme Court held that this fact must be taken and acted upon by the court in deciding the case before it. "Can there be any doubt," asked the court, "that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department?"[2] In other cases, the court has laid down the rule that the action of the political branches of the Government—Congress, the President, and the treaty-making power—in a matter that belongs to them is conclusive.[3] As ex-President Taft has pointed out, "the decision of Congress or the treaty-making power upon such an issue would be binding upon the courts, but in the absence of the decision of either, the action of the President is conclusive with the courts."[4]

[1] The treaty for the annexation of the Danish West Indies, brought forward in President Johnson's administration, also failed to secure the approval of the Senate largely on account of political hostility to the President, but the islands were subsequently annexed by treaty during President Wilson's administration.

President Roosevelt was probably largely influential in bringing about conditions which enabled the United States to secure possession of the Panama Canal Zone. Indeed, in an address at the University of California, March 23, 1911, he is reported as having said: "I took the Canal Zone."

[2] Williams *v.* Suffolk Ins. Co., 13 Pet., 420 (1839). Cf. Charlton *v.* Kelly, 229 U. S., 447.

[3] Foster *v.* Neilson, 2 Pet., 307; Garcia *v.* Lee, 12 *ibid.*, 511. Cf. Jones *v.* U. S., 137 U. S., 212.

[4] *Our Chief Magistrate and His Powers*, 118.

CONGRESSIONAL INITIATIVE AND INFLUENCE

On several occasions Congress has assumed to speak for the United States on questions of foreign policy, not, of course, as a direct organ of international communication, but rather as the mouthpiece of public opinion in matters concerning the nation, whether domestic or foreign. On account of the necessity which the President may feel of securing the support of Congress for the policy which he has tentatively determined upon, the action of Congress may sometimes be taken at the suggestion of the President. This is always true of a declaration of war, because the Constitution specifically invests that power in Congress. But the same thing may happen in cases in which the immediate action of Congress is not constitutionally necessary to the initiation of the project, however necessary the ultimate support of that body may be for the project's consummation. Thus, at the suggestion of President Madison, made in a confidential message of January 3, 1811, Congress passed a secret joint resolution, declaring that the "United States . . . cannot, without serious inquietude, see any part of the territory adjoining the Southern border of the United States pass into the hands of any foreign power." [1]

Congress, however, or either branch thereof, has sometimes taken the initiative in passing resolutions relating to foreign affairs which have not been suggested by the President. Thus, in 1864 the House of Representatives unanimously passed a joint resolution declaring that

"the Congress of the United States are unwilling by silence to leave the nations of the world under the impression that they are indifferent spectators of the deplorable events now transpiring in the Republic of Mexico; and that they therefore think fit to declare that it does not accord with the policy of the United States to acknowledge any

[1] Approved January 15, 1811, and published in 1818, 3 U. S. Stat. at L., 471-2.

monarchical government, erected on the ruins of any republican government in America, under the auspices of any European power."[1]

This resolution, which was evidently an attempt on the part of the House to force the hand of the President in regard to his Mexican policy, was not acted upon by the Senate. In a dispatch to our minister to France, Secretary Seward pointed out that it emanated from suggestions offered by members of the House itself, and not from any communication of the Executive department, and declared that the French Government would be seasonably apprised of any change of the policy of our Government toward Mexico. "This," he further declared, "is a practical and purely executive question, and the decision of it constitutionally belongs not to the House of Representatives nor even to Congress, but to the President of the United States."[2]

This note having been communicated to the House in response to a request from that body,[3] a report was made by the Committee on Foreign Affairs, expressing regret that the President should have thought proper to inform a foreign government of a "radical and serious conflict of opinion and jurisdiction between the depositories of the legislative and executive power of the United States."[4] The report also recommended the adoption of a resolution, which, with a slight amendment, was passed by the House a few months later, declaring that

"Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as well in the recognition of new powers as in other matters; and it is the constitutional duty of the

[1] Cong. Globe, April 4, 1864, vol. 34, p. 1408.
[2] Mr. Seward to Mr. Dayton, April 7, 1864, Sen. Ex. doc. 6, 39th Cong., 1st sess., p. 5; Hinds, *Precedents*, II, 1007.
[3] House Ex. doc. 92, 38th Cong., 1st sess.
[4] House report no. 129, 38th Cong., 1st sess., p. 1 (June 27, 1864).

executive department to respect that policy, not less in diplomatic negotiations than in the use of national force when authorized by law; and the propriety of any declaration of foreign policy by Congress is sufficiently proved by the vote which pronounces it; and such proposition, while pending and undetermined, is not a fit topic of diplomatic explanation with any foreign power."[1]

In the debate on this resolution Mr. Blaine declared that it embodied "a new theory in the administration of our foreign affairs."[2] Its contention that Congress is invested with an authoritative voice in determining the foreign policy of the United States seems, indeed, scarcely to be borne out by previous and subsequent practice. In spite of the passage of the resolution, President Lincoln kept full control over the policy of our Government towards the French in Mexico, and the wisdom of this course was demonstrated by the result. We must concur in the judgment passed upon this incident by a leading American historian, who says:

"Our democracy and our representatives in Congress probably will never learn that the delicate questions of diplomacy, until they reach the point where constitutionally the Senate and the House must be partakers in the action, ought to be left to the Executive. It will prove generally, as it certainly did in this case, that the President and the Secretary of State can deal with such matters with greater foresight and wisdom."[3]

[1] The first half of the resolution was carried by a vote of 118 to 8 and the second half by 68 to 58. Cong. Globe, 38th Cong., 2nd sess., Dec. 19, 1864, pp. 66-7; cf. J. M. Callahan, *Evolution of Seward's Mexican Policy*, 49; Hinds, *Precedents*, II, 1009.

[2] The resolution as passed by the House was a simple House resolution and therefore was not submitted to the Senate, but on Feb. 28, 1863, a concurrent resolution was introduced in the Senate by Mr. Sumner, from the Committee on Foreign Relations, declaring that Congress would be obliged to look upon any further attempt at mediation by foreign powers in the Civil War as an unfriendly act. President Lincoln, however, had already promptly rejected the offer of mediation. Sen. misc. doc. 38, 37th Cong., 3rd sess.

[3] Rhodes, *History of the United States*, IV, 471.

The Senate, also, has undertaken, on occasion, to formulate the foreign policy of the United States independently of Presidential suggestion. Thus, in view of the reported attempt of a Japanese corporation to secure control of land on Magdalena Bay in Lower California, the upper house, on August 2, 1912, by a vote of 51 to 4, adopted the following simple resolution:

"That when any harbor or other place in the American continents is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government, not American, as to give that Government practical power of control for naval or military purposes." [1]

That this was intended as an announcement to foreign powers of our national policy was clearly shown by the statement of Senator Lodge, chairman of the Committee on Foreign Relations, who said: "It seemed to the Committee that it was very wise to make this statement of policy at this time, when it can give offense to no one and makes the position of the United States clear."[2]

The Senate has also undertaken to enunciate general principles of American foreign policy in the form of reservations attached to its resolutions advising and consenting to the ratification of treaties. Thus, in consenting to the ratification of the conventions adopted at the First and Second Hague Conferences and at the Algeciras Conference in 1906, the Senate did so on condition that such action

[1] Cong. Record, vol. 48, pp. 10045-7. This resolution was passed after information on the subject had been sought and obtained from the President which "went to show that the conduct of other powers in regard to those lands had been entirely correct." 6 *Am. Jour. Internat. Law*, 938. See also Sen. rept. 996 and Sen. docs. 640 and 694, all of the 62nd Cong., 2nd sess.

[2] Cong. Record, vol. 48, p. 10045. The Magdalena Bay resolution, being a simple Senate resolution, and not a joint resolution, was not submitted to the President for his approval or disapproval.

should not be so construed as to require the United States to depart from its traditional policy against participation in the settlement of European political questions, nor from its traditional attitude toward purely American questions.[1] In order that such reservations may have any legal validity as part of the treaty they must be approved by the President; for if they were unsatisfactory to him he might refuse to proceed with the ratification. Practically, however, he might, under some circumstances, be forced to give formal approval to Senate reservations to which he was really opposed in order to secure the consent of the Senate to the ratification of a treaty of which, in the main, he approved.

Finally, the two houses of Congress, by act or by joint resolution, may undertake to formulate foreign policies, although, in this case, the project, in order to be adopted, must, of course, be approved by the President or repassed over his veto.[2] For example, in 1916 Congress passed an act by which it was "declared to be the policy of the United States to adjust and settle its international disputes through mediation or arbitration, to the end that war may be honorably avoided."[3]

CONGRESSIONAL REQUESTS FOR INFORMATION

The control of foreign relations naturally tends to gravitate into the hands of that department of the government which is in the best position to secure, as a basis for action, adequate information regarding the state of those relations.

[1] Malloy, *Treaties*, 2032, 2183, 2247.

[2] When such a policy depends for its execution upon positive action on the part of the President, it could hardly be carried out, if disapproved by him, even though the act or joint resolution embodying it were repassed over his veto.

[3] 39 U. S. Stat. at L., 618. It should be mentioned that Congress exercises a very pervasive influence throughout the administration of foreign relations by means of its power of passing or withholding appropriations. This power is discussed in connection with the various phases of foreign relations upon which it exerts an influence.

In this respect Congress is at a disadvantage as compared with the President, who very largely controls the official channels of information. Through his control over the state department and the diplomatic service, he is in touch with more authentic and widespread sources of information than are available for others. In order to take intelligent action in regard to foreign relations, Congress is therefore frequently dependent upon such information as it may be able to secure from the President. On account of the largely separate and independent position occupied by the legislative and executive departments in our Government, the heads of executive departments having no seats in Congress, facilities do not exist such as are found in European parliamentary governments, whereby the legislature, through direct questions and interpellations, may secure information from the executive. Our Constitution, however, imposes upon the President the duty to give to Congress, from time to time, information on the state of the Union; and the Secretary of State sometimes appears, upon request, and testifies before the Senate Committee on Foreign Relations.

The ordinary means, however, whereby Congress attempts to secure information from the President is the passage of simple Senate or House resolutions requesting him to furnish it. Each branch of Congress is constantly attempting to take a hand in foreign relations by requesting the President or Secretary of State to furnish information regarding them. Compliance with such requests, however, is almost invariably asked only in so far as may be deemed compatible with the public interests.[1] The ques-

[1] On January 4, 1848, however, the House passed a resolution, without the customary reservation, requesting certain information from President Polk, and he declined to transmit it to that body except in so far as he deemed it expedient to allow it to become public. Richardson, *Mess. and Pap. of the Presidents*, IV, 566.

In 1826, it was moved to amend a House resolution calling upon the President for information by striking out the customary condition of compatibility with the public interest. In the course of debate, it was argued that the House

tion whether it is compatible with the public interests to furnish information asked for is one to be decided freely by the President; except in a case of impeachment, an unwilling President cannot be compelled to furnish information.[1] Although the President usually complies with such requests, he sometimes does so only after a prolonged delay; he may fail to make any answer at all, or may expressly decline to comply with the request, on the ground that it is incompatible with the public interests to make the information public, since it relates to a matter about which negotiations with foreign powers are pending.[2] The House and Senate resolutions are generally directed to the President, but sometimes to the Secretary of State. The latter officer, however, acts as the agent of, and in subordination to, the President, and will not furnish the information requested if directed by the President not to do so. In 1909 President Taft issued an executive order directing the heads of departments to furnish information when called upon by a resolution of the Senate or House of Representatives, unless in their judgment it was incompatible with the public interests to do so; and in this case they should refer the matter to the President for his direction.[3]

The President sometimes sends information to Congress with the request that it be considered in confidence and be not made public immediately. Thus, President Adams, in 1798, transmitted, with such a request, certain papers con-

might demand any information it might constitutionally want, and, in case of refusal, take the information by ordinary process of the Sergeant-at-Arms. This extreme view, however, was opposed by others who held that the President was as independent in his sphere as the House in theirs. Daniel Webster was among those who opposed the amendment, and it was lost by a vote of 71 to 98. Hinds, *Precedents*, II, 1019-1021.

[1] This was indicated in the case of President Washington's contest with the House over the Jay Treaty, as noted below (see p. 220).

[2] For example, President Wilson and Secretary Bryan refused on this ground to comply with the requests of the Senate calling for all correspondence with belligerent nations concerning the treatment of shipments of copper to neutral countries and concerning the treatment of certain naval stores as contraband of war, as embodied in its resolutions of Jan. 6 and Jan. 8, 1915. Sen. docs. 798 and 799, 63rd Cong., 3rd sess.

[3] Executive order No. 1062, April 14, 1909.

cerning our relations with France.[1] The President cannot be absolutely assured, however, that his request for secrecy will be observed. Congressional requests for information may have the effect of placing the President in an embarrassing position, because if he answers that it would be incompatible with the public interest to make the information public, his answer may be misconstrued and may give rise to the suspicion that the transactions involved are of such a character that they will not bear the light of day. Accordingly, the President may prefer to make no answer at all. This course may seem to be not very courteous to Congress, but it may not be without justification. Just as interpellations in France may be designed, not so much to secure information, as to bring on a vote of want of confidence in the Government, so requests for information by Congress may be made in order to embarrass the administration in handling foreign relations and may even be disguised attempts on the part of Congress to force the hand of the President and to reduce the degree of control over international affairs which he would otherwise be able to exercise. This is especially likely to happen when there is a lack of good working relations between the President and Congress, due to the fact that the two branches of the Government are controlled by rival political parties or by different factions of the same party.

As a rule, information is requested of the President by House or Senate resolution only upon matters with regard to which those bodies are constitutionally empowered to take action. Thus, in the performance of their constitutional functions in connection with impeachment, the two houses of Congress may doubtless exercise such incidental powers as are necessary in order that the constitutional power may be effectuated. One such incidental power might be that of requiring information, including essential papers and documents, from the President or head of an executive

[1] Richardson, *Mess. and Pap. of the Presidents*, I, 265.

department, regarding his conduct in office. Where the constitutionally authorized action contemplated by Congress, however, does not specifically relate to the conduct of the Executive, as, for example, the passing of an appropriation bill, the situation would be different. President Washington, as we shall see, refused to send to the House of Representatives copies of Jay's instructions and other papers relating to the Jay Treaty, although he intimated that, had it been a case of impeachment, he would have furnished them. Except where the Congressional action contemplated relates specifically to the conduct of the Executive, the President has full discretion to withhold the information requested, if he so desires, even though it relates to a matter upon which Congress is constitutionally empowered to act. The right to refuse exists, *a fortiori,* if the Congressional action contemplated relates to a matter about which Congress is not empowered, by the Constitution, to act.

INTERNATIONAL COMMUNICATION

A distinction may be made between the formulation of foreign policies and the direct communication of them to foreign governments. The power of formulation and that of direct communication are commonly, but not necessarily, vested in the same organ of government. Direct communication with foreign governments is usually maintained through the sending and receiving of diplomatic representatives. The conduct of foreign relations, however, includes not only diplomatic intercourse, but also such other means and instrumentalities as may be employed for the purpose of international communication. Foreign policies may be formulated by the appropriate organ of our Government and merely announced to the world without immediate direct communication of them to any particular foreign nation or group of nations. International communication,

therefore, may be indirect, as well as direct. Where foreign policies are formulated and promulgated without being directly communicated to any particular nation, they are usually general in character and are intended for the information of any nation or group of nations to which the terms and conditions stipulated may be applicable.[1] Sometimes, however, the indirect method may be adopted for the communication of a policy intended to apply to a single nation.

That the President is the sole organ of communication with foreign governments has been maintained in the utterances of publicists and officials of the Government since its foundation. In 1793, M. Genet, the French minister, having requested an exequatur for a consul whose commission was addressed to Congress, Secretary of State Jefferson informed him that the President, "being the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such, they have a right, and are bound to consider as the expression of the nation."[2] The same idea was expressed in Congress by John Marshall during the debate on the Jonathan Robbins extradition case, in which he said: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him."[3] In the papers which he published under the name of "Pacificus" *a propos* of Washington's proclamation of neutrality in 1793, Alexander Hamilton enunciated practically the same principle, although in negative form, as follows: "The legislative department is not the organ of intercourse between

[1] It is of course true that general policies applying to a group of nations may also be directly communicated, as in the case of Secretary Hay's circular note to Russia, Germany, Great Britain, Italy and Japan regarding the policy of the "open door" in China. *For. Rels. of U. S.*, 1899, 140-1; *ibid.*, 1900, 142.

[2] *Am. State Papers, For. Rels.*, I, 184; Moore, *Digest of Int. Law*, IV, 680.

[3] *Annals*, March 7, 1800, 6th Cong., col. 613.

the United States and foreign nations. It is charged neither with making nor interpreting treaties. It is therefore not naturally that member of the government which is to pronounce on the existing condition of the nation with regard to foreign powers."[1]

The above statements manifestly have reference mainly to direct communication with foreign nations. There is nothing physically impossible, however, about a legislative body carrying on foreign relations directly through its own agents. If any proof of this were needed, it would be supplied by our own experience under the Articles of Confederation. That experience, however, also revealed the unsatisfactory results which flow from the conduct of foreign relations by a legislative body. Under the Articles, Congress had the powers of sending and receiving diplomatic representatives—powers which neither Congress nor the Senate can exercise under the present Constitution. Under the latter instrument these powers are transferred to the President, and by custom and practice it has been established that these powers of the President are exclusive, so that he becomes the sole organ of direct communication with foreign governments.

In communicating with foreign governments, Congress, therefore, is limited to the indirect method, which may use as a medium either the President or Secretary of State or a general announcement conveyed to the world through the ordinary channels for the transmission of intelligence. In employing the former means of indirect communication, Congress is dependent upon the consent of the President. It may "request," but may not "direct," the Secretary of State to transmit on its behalf a communication to a foreign government; for the Secretary of State is the agent of the President in handling foreign affairs and conducting correspondence with foreign governments, and whatever direc-

[1] *Works* (Lodge ed.), IV, 139.

tions are issued to him relating to these matters properly come from the President.[1] Thus, when, in 1877, Congress passed two joint resolutions calling upon the Secretary of State to communicate to the Argentine Republic and the Republic of Pretoria acknowledgments of the receipt by Congress of congratulatory messages from these governments, President Grant vetoed both resolutions, on the ground that, in effect, they infringed upon the constitutional rights of the Executive. "The Constitution," he declared, "following the established usage of nations, has indicated the President as the agent to represent the national sovereignty in its intercourse with foreign powers and to receive all official communications from them . . . making him, in the language of one of the most eminent writers on constitutional law, 'the constitutional organ of communication with foreign states.' "[2] The President's veto message was referred to the House Committee on Foreign Affairs, but was never reported therefrom. Even if the resolutions had been repassed over the veto, it is doubtful whether there would have been any legal means of compelling the President or his Secretary of State to transmit them.

If Congress cannot communicate with a foreign government by means of a joint resolution repassed over the President's veto, neither can it do so by means of a concurrent resolution, for to such a resolution the President need pay no attention whatever. This mode, nevertheless, seems to have been supposed possible by the framers of one of the proposed Senate reservations to the Treaty of Versailles, which provided that "notice of withdrawal by the United States (from the League of Nations) may be given by

[1] The act of Congress of July 27, 1789, establishing the State Department (or Department of Foreign Affairs, as it was then called), required the Secretary "to perform and execute such duties as shall, from time to time, be enjoined on or intrusted to him by the President," etc., 1 Stat. at L., 28.

[2] Richardson, *Mess. and Pap. of the Presidents*, VII, 431; Hinds, *Precedents*, II, 1024.

a concurrent resolution of the Congress of the United States."[1]

The President or his Secretary of State, however, may voluntarily act as a transmitting agent for communications between Congress and foreign governments.[2] Congress may also ask the President to undertake diplomatic or treaty negotiations, and the request may have moral, although not legal, weight in determining the Chief Executive's action.[3] Moreover, there is nothing directly to prevent communications being carried on between Congress, or either branch thereof, through its presiding officers, or officer, and the minister of a foreign government accredited to the United States, independently of the President and the State Department; and this has sometimes been done.[4] If such communications were obnoxious to the President, however, the recall of the foreign minister by his government could be requested; and if compliance with this request were not forthcoming, he could be dismissed by order of

[1] Cong. Record, March 19, 1920, p. 4899. In this connection it may be mentioned that unauthorized communication with foreign governments was made a criminal offense by the Logan Act of Jan. 30, 1799; R. S. sect. 5335.

[2] Thus, in 1908, House and Senate resolutions expressing sympathy and sorrow in view of the assassination of the King and Crown Prince of Portugal were transmitted by the Secretary of State to the Portuguese Government, and the answer of the Portuguese Foreign Minister transmitted by the Secretary of State to the Speaker of the House. House docs. 741 and 754 and Sen. doc. 317, all of the 60th Cong., 1st sess. Again, in 1912, the Secretary of State transmitted a note of the Chinese minister expressing thanks for a message of congratulation to the people of China, as embodied in a Congressional concurrent resolution. 37 Stat. at L., 1460; House rept. 368, and Sen. doc. 641, both of the 62nd Cong., 2nd sess. In 1919 the State Department transmitted to the Senate a resolution of the National Assembly of Panama asking that body not to change the name of the trans-isthmian canal from Panama to Roosevelt. House doc. 67, 66th Cong., 1st sess. For other instances of a similar character, see Hinds, *Precedents*, II, 1022, 1025.

[3] For example, by a joint resolution of March 2, 1895, Congress requested the President to insist upon the payment by Spain of the Mora claim.

[4] Thus, on June 4, 1920, the Vice President laid before the Senate a communication from the Italian ambassador at Washington on behalf of his government, directed to the Vice President as president of the Senate, and expressing appreciation for the Senate resolution commemorating the anniversary of Italy's entrance into the war. Cong. Record, June 4, 1920, p. 9104. A similar instance occurred in 1894 when the Speaker laid before the House a cable dispatch from the Government of France to the Speaker acknowledging the action of the House in passing a resolution of sorrow at the assassination of President Carnot. Hinds, *Precedents*, II, 1025.

the President. The same fate might also befall a foreign minister who should hold personal conferences with individual Senators about official matters, if this were distasteful to the President.[1] The President would also have the right to object in the same decisive manner to any attempt on the part of a diplomatic representative of a foreign government to communicate directly with the American people about official matters.[2] In all these cases, the foreign minister would be guilty of the offense of attempting to communicate directly with persons with whom he can properly have no official dealings and of ignoring to that extent the President with whom alone he has the right of communicating on official subjects.

Where, however, no exchange of views is involved, Congress may, in effect, communicate with a foreign government without the intermediation of the President or State Department, by a public announcement transmitted through the ordinary channels of publicity. An example is the declaration of war, which usually comes only after direct diplomatic communication with the government against which it is directed has been severed. The government affected naturally takes cognizance of the declaration without special notification.[3]

[1] On December 14, 1911, Senator Bacon said: "Within the last two months, I have had a conference and quite a discussion with the Russian ambassador regarding negotiations looking to a new treaty with Russia." Cong. Record, Vol. 48, p. 372.

[2] A notorious offender in various respects was M. Genet, the French minister, who was recalled at the request of the Washington administration. Moore, *Digest of Internat. Law*, IV, 485-8; 680-1. In his first Lusitania note, May 13, 1915, the Secretary of State, on behalf of the President, called the attention of the German Government to the "surprising irregularity of a communication from the Imperial German Embassy at Washington addressed to the people of the United States through the newspapers." For another instance of the same sort see Moore, *op. cit.*, IV, 682.

[3] This was done also in the case of the Congressional joint resolution of April 20, 1898, authorizing intervention in Cuba. This was in the nature of an ultimatum or virtual declaration of war. Before it could be communicated to the Spanish Government through our minister at Madrid, he received a note from that Government, stating that, in consequence of the Congressional ultimatum, all diplomatic relations were severed. Moore, *op. cit.*, VII, 170.

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CHAPTER II

THE STATES AND FOREIGN RELATIONS

THE conduct of a nation's foreign relations may be affected to a considerable extent by the form and character of internal governmental organization. Speaking generally, an energetic and effective foreign policy is possible for a nation in proportion as its government exhibits unity and coherence. This is true with reference to the relations not only between the departments of the central government, but between the central government and the local or state governments. In countries whose government is based on the federal plan, therefore, an important question to be considered is the amount, if any, of control over foreign relations which is assigned to the divisional governments. The tendency in federal, and even in confederate, governments is to restrict within very narrow limits, if not absolutely to prohibit, any direct control of the states, or other divisions, over foreign relations.

Under the Articles of Confederation the diplomatic, war, and treaty powers were, in express terms, vested in the central government, and the powers of the states in those respects were restricted within narrow limits. The Articles, however, preserved the legislative power of the states over foreign commerce, even as against the power of the central government to enter into commercial treaties, and in practice this operated as a serious limitation upon the central government's control over foreign relations. The confusion resulting from divided jurisdiction over commerce was one of the principal difficulties leading to the adoption of the Constitution.

DIRECT INFLUENCE

The experience gained under the Articles led to the placing in the Constitution of strict limitations upon the power of the states in connection with foreign relations. The states were absolutely prohibited from making treaties, and treaties made under the authority of the United States were declared to be the supreme law of the land, notwithstanding anything to the contrary in the laws of any state. Moreover, except with the consent of Congress, the states were prohibited from entering into any agreement or compact with a foreign power and from engaging in war, unless in imminent danger of invasion.[1] The term "war" properly denotes an armed conflict between nations and, as here used, probably refers to danger from a foreign source or from Indians.[2]

In 1839 our relations with Great Britain became strained on account of a dispute over the location of the boundary line between Maine and Canada. Maine and New Brunswick marched opposing forces into the disputed territory, bringing on what is known as the "Aroostook War." The United States and Great Britain, however, entered into negotiations for a treaty to settle the dispute. "It was deemed necessary on the part of our Government to secure the coöperation and concurrence of Maine, so far as such settlement might involve a cession of her sovereignty and jurisdiction as title to territory claimed by her, and of Massachusetts, so far as it might involve a cession of title to lands held by her. Both Maine and Massachusetts appointed commissioners to act with the Secretary of State

[1] The powers of the states, moreover, are restricted with reference to the regulation of foreign commerce and the levying of import and export duties. It should be mentioned, too, in this connection that the state courts are excluded from jurisdiction in cases to which foreign ambassadors, other public ministers, or consuls are parties.

[2] Willoughby, *Constitutional Law of the United States*, II, 1239. Chief Justice Taney, in Luther *v.* Borden (7 How., 1) declared that Rhode Island, during Dorr's Rebellion, was in a state of war; but this was a misuse of the term, as was pointed out by Justice Woodbury in his dissenting opinion.

and, after much negotiation, the claims of the two states were adjusted and the disputed questions of boundary settled."[1] The result was the Webster-Ashburton treaty of 1842, wherein (Art. V) the United States agreed to receive and pay over to Maine and Massachusetts their share of the "disputed territory fund," and also to compensate those states by the payment of a further sum of money on account of their assent to the boundary line fixed by the treaty.[2]

Although the claims of the two states were thus recognized by the treaty, they were not adjusted directly by the states, but rather by the Government of the United States acting in their behalf. An American writer suggests that Webster did not consider the coöperation of the state authorities a constitutional necessity, but merely thought it expedient from a political standpoint that the opinion of these states should be considered.[3] This author admits, however, that the states might possibly have international dealings with reference to such an unimportant matter as the administration of fishing upon boundary waters.[4] In this connection it has been suggested by another writer that a state might enter into an agreement with Canada or a bordering Canadian province to regulate fisheries in their contiguous waters, in the absence of a formal treaty by the United States covering the subject. "May there not properly be," this writer asks, "an autonomy in local external affairs, at least as to the states bordering on Canada or Mexico, just as there is a local autonomy in matters purely domestic?"[5]

The question came before the Supreme Court in 1840 as to whether the surrender to Canadian authorities by the

[1] Ft. Leavenworth R. R. Co. *v.* Lowe, 114 U. S., 541, quoting Webster, *Works*, V, 99; *ibid*, VI, 273.
[2] Malloy, *Treaties*, etc., I, 654.
[3] Willoughby, *op. cit.*, I, 509.
[4] *Ibid*, I, 508, note 23.
[5] J. F. Barrett, "International Agreements Without the Advice and Consent of the Senate," *Yale Law Journal*, XV, 23, 27 (Nov., 1905). But see, *contra*, Butler, *Treaty-Making Power*, I, sect. 123.

governor of Vermont of a fugitive from justice was within his constitutional power. No judgment was rendered in the case, since the court was equally divided on the question of jurisdiction; but a majority of the judges, including Chief Justice Taney, were of the opinion that the governor did not have the power to deliver up the fugitive to a foreign government. In his opinion Taney pointed out that such a delivery involves an agreement with a foreign government, which the states are not competent to make without the consent of Congress.[1] Many years later the same court declared, *obiter,* that "there can be little doubt as to the soundness of the opinion of Chief Justice Taney that the power exercised by the governor of Vermont is a part of the foreign intercourse of this country, which has undoubtedly been conferred upon the Federal Government; and that it is clearly included in the treaty-making power, and the corresponding power of appointing and receiving ambassadors and other public ministers. There is no necessity for the states to enter upon the relations with foreign governments, which are necessarily implied in the extradition of fugitives from justice found within the limits of the state, as there is none why they should in their own name make demand upon foreign nations for the surrender of such fugitives. At this time of day and after the repeated examinations which have been made by this court into the powers of the Federal Government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of the Union and a foreign government."[2]

The governor of a state from which a fugitive from justice has fled to a foreign country must ordinarily act through the Secretary of State at Washington in demand-

[1] Holmes *v.* Jennison, 14 Pet., 540.
[2] United States *v.* Rauscher, 119 U. S., 407 (1886).

ing from such government the return of the fugitive in accordance with extradition treaties between the two countries. This, however, does not hold where there are acts of Congress or treaties of the United States expressly authorizing extradition proceedings to be conducted by the governor of a state directly with the authorities of a foreign government. Thus, our treaty of 1861 with Mexico empowered the chief executives of the border states and territories to make requisitions and to grant extradition in certain cases.[1] Again, our extradition conventions with Denmark and the Netherlands provided that application for the surrender of a criminal may be made directly to or by the governor or chief magistrate of the island possession or colony of the respective countries.[2] In such cases, it may be said that the chief executive of the state or territory is acting primarily as the agent of the United States Government.

In general, however, direct contact of the state governments with foreign governments is, under the Constitution, reduced to a negligible quantity. The ruling doctrine on this matter has been laid down by the Supreme Court in a number of cases. Thus, in the Arjona case, wherein was upheld a Federal statute punishing the counterfeiting in the United States of the securities of foreign nations, the Court said: "The Government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. . . . Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose given to the United States."[3] Again, in the Chinese exclusion case, the Court said: "For local interests, the several states of the Union exist; but for international purposes, embracing our relations with foreign nations,

[1] Malloy, *op. cit.*, 1126. This provision was renewed by the treaty of 1899. *Ibid.*, 1188. Cf. Moore, *Extradition*, I, 53-78.
[2] Malloy, *op. cit.*, 395, 1272.
[3] United States *v.* Arjona, 120 U. S., 479.

we are but one people, one nation, one power."[1] The same view is stated by the Court in the Legal Tender case: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all of which are forbidden to the state governments."[2]

INDIRECT INFLUENCE

Although the general principle, as thus laid down by the Supreme Court, is undoubtedly correct as far as direct control by the states over foreign relations is concerned, it is still possible for the states to take action which will indirectly affect such relations. The extent of this indirect influence may, of course, vary considerably. State legislatures not infrequently pass resolutions petitioning Congress or the Executive to take or not to take certain action in connection with our foreign relations, or expressing congratulation or sympathy with particular foreign countries.[3] Such a resolution is likely to be a mere *brutum fulmen,* and is usually pure buncombe. The feeling is apparently growing that a state legislature ought not thus to attempt to take a hand in foreign affairs, unless, at all events, the situation or policy aimed at is deemed peculiarly to affect the welfare of the state.

A more important method by which a state may indirectly influence foreign relations is the taking of action which may purport to affect the status of aliens residing in such state, or failure to take action for their protection in the exercise of rights which they claim under treaties. This point is thus set forth in a Senate document relating to the power

[1] Chae Chan Ping *v.* United States, 130 U. S., 581, 606. Cf. Fong Yue Ting *v.* United States, 149 U. S., 698.

[2] Knox *v.* Lee, 12 Wall., 457, 555.

[3] Thus, in 1897 the Senate of Nebraska adopted a resolution extending sympathy to Cuba. U. S. Senate doc. 82, 54th Cong., 2nd sess.

of recognition: "A state of the Union, although having admittedly no power whatever in foreign relations, may take action uncontrollable by the Federal Government, and which, if not properly a *casus belli*, might nevertheless as a practical matter afford to some foreign nation the excuse of a declaration of war. We may instance the action which might have been taken by the state of Wyoming in relation to the Chinese massacres, or the state of Louisiana in relation to the Italian lynchings, or by the state of New York in its recent controversy with German insurance companies with relation to the treatment of its own insurance companies by Germany."[1] As to whether the action of the states in such matters is, in all cases, uncontrollable by the Federal Government, there may be some question. Judging, however, by the number of instances in which the nation has been embroiled in international difficulties by the action or non-action of states, it would seem that no effective means of preventing such state interference has yet been devised.

Some of the difficulties encountered have arisen from the failure of states to protect aliens against individual or mob violence and to provide means of redress for injuries thus inflicted. Congress could probably constitutionally provide such means of redress through federal agencies, but it has thus far failed to do so.[2] Other difficulties arise from the passage of acts or ordinances by states or municipalities which discriminate, or are alleged to discriminate, against aliens in violation of their treaty rights. Among these measures are labor laws, land laws, and laws or ordinances regulating the privilege of attending the public schools. Some have been declared unconstitutional by the courts as in violation of treaty provisions. Probably the most conspicuous of the state laws and local ordinances which have given rise to international difficulties are the San Francisco

[1] U. S. Senate doc. 56, 54th Cong., 2nd sess., p. 5.
[2] Baldwin *v.* Franks, 120 U. S., 678.

school ordinance and the California alien land law, aimed at aliens ineligible to citizenship. Public sentiment on the matter in California is strikingly indicated by the adoption in 1920, through the popular initiative, and by a vote of three to one, of an alien land law, to which Japan objected as being in violation of treaty rights.[1]

The treaty-making power has itself at times sought to avoid conflicts with the states which would be likely to arise from national regulation of matters that otherwise would be under state control. Provisions have been inserted in treaties which, instead of purporting directly to determine

[1] The action of the people of California in enacting directly through the popular initiative this alien land law is an example of popular influence in foreign affairs, exercised in a somewhat novel fashion. The desirability of having the support of public opinion in the conduct of foreign relations has been recognized by various Presidents, who have sometimes made direct appeals to the people on behalf of particular policies. The importance of public opinion among us in such matters has also been recognized by other governments, as was illustrated by their attempts to influence it, before our entrance into the World War, through securing control of newspapers and other means of publicity and propaganda. Much has been said in favor of full publicity as a condition of democratic diplomacy. Intelligent and judicious influence by the people upon foreign relations presupposes, however, a considerable amount of popular information on such matters. The extent of desirable publicity in foreign policy is logically limited by the extent to which the people can exercise an effective control, and that reaches only to general policies and not to details or matters requiring quick decision. Some persons have advocated a popular referendum on the question of peace or war as a preliminary step to the entrance into war by the United States. W. J. Bryan has gone on record as declaring that "a referendum on war would give greater assurance of peace than any other provision that could be made." (Editorial reprinted in Congressional Record, January 22, 1920, p. 1966.) The delay, however, which would ensue before a decision could be arrived at, if such a plan were adopted, would seem alone to be sufficient to render the idea impracticable. Furthermore, the inherent defects of the control of foreign policy by a deliberative assembly would be greatly enhanced by the adoption of such a plan. Often there is no time for consulting the popular will and, even if it were done, in many cases no clear answer would or could be given. It would be difficult to frame the issue, for the manœuvers of the foreign government would be an uncertain and uncontrollable factor in the situation. The objections to the popular referendum in foreign affairs have been summed up as follows: "The referendum is not advisory in any honest sense of the word, because the decision of the government must be composed of an intricate series of problems which cannot be isolated. On most of the points the answer is not yes or no, but a course of action with many ramifications of detail. A government dependent on referendum for advice about every crucial point could survive only in a world where magic kept everything frozen tight while the referendum was being taken. In a world of swift action, of surprises, of intrigue, there can be neither safety nor success for an administration which had no power to act." (*New Republic*, February 24, 1917, p. 92.)

the point in question, merely constitute an undertaking on the part of our Government to recommend to the states that the appropriate action be taken. The earliest example of this is the treaty of 1783 with Great Britain, in which (Art. V) it was agreed that the Congress of the Confederation should "earnestly recommend to the legislatures of the respective states to provide for the restitution of all estates" of British subjects.[1] Other examples may be found in treaties made since the adoption of the Constitution. Thus, Article VII of the treaty of 1853 with France provided that "as to the states of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right."[2]

Instances of this sort have, however, been rare; and, as has been pointed out, if the United States were required, as a rule, to resort to such procedure, the ultimate result would be that few nations would be willing to grant us privileges in exchange for a mere promise on the part of our Government to recommend to the states the granting of similar concessions.[3] The courts have construed the treaty-making power as extending to all matters which are appropriate subjects of international negotiation,[4] and, as the Supreme Court declared in the Arjona case, "the national government is . . . responsible to foreign nations for all violations by the United States of their international obligations."[5] This being the case, it follows that the National Government must have power commensurate with its responsibility. Ultimately, by Congressional action, or by constitutional amendment if necessary, means of control

[1] Malloy, *Treaties*, etc., I, 588.
[2] *Ibid.*, I, 531. Cf. a similar provision in the treaty of 1871 with Great Britain, *ibid.*, I, 711.
[3] Crandall, *Treaties, Their Making and Enforcement*, 267.
[4] De Geofroy *v.* Riggs, 133 U. S., 256, 266-7. Cf. Missouri *v.* Holland, 252 U. S., 416.
[5] United States *v.* Arjona, 120 U. S., 479.

must be provided for the full preservation of treaty rights by the National Government. At the same time, care should be taken, as far as possible, that no treaty engagements be entered into whose execution will arouse the deep-seated hostility of the great majority of the people in particular states.

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CHAPTER III

THE DEPARTMENT OF STATE

IN the conduct of foreign relations, the President, although ultimately responsible to the people for the general success or failure of policies pursued and efforts made, is unable, of course, to give his personal attention to any questions of policy except those which he deems to be the most important and momentous. For handling the great mass of routine matters, and even for the determination of many questions of policy which are of considerable importance, he is dependent upon the assistance of the agencies supplied for that purpose. These agencies are, principally, the department of state, the diplomatic service, and the consular service. The three are, in reality, parts of one system, which has its head office in Washington and its agents in every part of the world. For purposes of convenience, however, they may be considered separately.

HISTORICAL DEVELOPMENT

Although the Constitution definitely provides for the appointment by the President of diplomatic and consular agents, no specific provision is made in that instrument for the creation of an executive department of the government to handle foreign affairs. That various executive departments would be created was, however, implied in the stipulations that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices" and that Congress may vest the appointment of inferior officers in the President alone or in the

heads of departments. Except negatively, through his veto power, the President has no legal control over the creation of such departments. They can be established only by Congressional statute; and Congress proceeded to exercise this power very shortly after the government went into operation under the present Constitution. An act of July 27, 1789, created a department of foreign affairs, at whose head was placed a secretary of foreign affairs. This officer was, of course, to be appointed by the President with the advice and consent of the Senate, but considerable debate arose in Congress as to whether the President should also have the power of removing him from office. Upon this point the Constitution was silent. Some members of Congress were of the opinion that, on the analogy of the method of appointment, the President should have the power to remove only with the consent of the Senate. James Madison strongly opposed this view, on the ground that such a plan might have the effect of making an administrative officer who was supposed to be subordinate to the President in reality independent of him. Since the President must bear the responsibility for the conduct of foreign relations, he should have power over the head of the department of foreign affairs, without interference, other than by way of advice, from the Senate. This view finally prevailed, but it was considered improper expressly to confer upon the President the power of removal, since this might be construed to imply that he had no such authority under his general executive power, unless conferred by statute. Consequently, as finally passed, the act merely implied the existence of the power of removal in the President without expressly conferring it.

The duties of the secretary for the department of foreign affairs and his relation to the President were specified in the act as follows: "To perform and execute such duties as shall, from time to time, be enjoined on or intrusted to him by the President of the United States, agreeable to the

Constitution, relative to correspondence, commissions, or instructions, to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department, and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall, from time to time, order or instruct."[1]

After the establishment of the original executive departments it was found that there were certain necessary executive matters which did not fall within the assigned field of any of the departments. They were such matters as are ordinarily attended to by the Home Secretary in other governments. It was decided, however, not to create a separate home department, and in September, 1789, these duties in relation to home affairs were imposed upon the department for foreign affairs, and the name of the department was changed to "department of state" and that of the chief officer in the department to "secretary of state." These duties relating to home affairs included at first the preservation and promulgation of the laws, the keeping of the great seal and the official records of the Government, and the attestation of commissions and proclamations by affixing the seal to them. Shortly afterwards, further duties connected with home affairs were assigned to the department of state, notably those connected with patents, copyrights, the census, and supervision of the territories. These last-mentioned functions were, however, transferred to the department of the interior upon its creation in 1849. The duties relating to home affairs still retained by the department of state include those connected with the election of the President and Vice President, the adoption of

[1] 1 Stat. at L., 28.

amendments to the constitution, and the custody of the seals and archives of the Government. The secretary of state also publishes the laws and resolutions of Congress and acts as the medium of correspondence between the President and the state governors. These functions are purely formal. They add no prestige or influence to the office of secretary of state and might, without loss, be transferred to the department of the interior.

The first secretary of state appointed by President Washington after the creation of the department was Thomas Jefferson, and the subsequent occupants of the office include many of the most distinguished statesmen of the country, notably Marshall, Madison, Monroe, J. Q. Adams, Clay, Webster, Calhoun, Marcy, Blaine, Olney, Hay, and Root. Many of the secretaries had, before their appointment, rendered eminent service in the halls of legislation and as diplomatic representatives of their country. Six of them subsequently became President of the United States.

THE OFFICE OF SECRETARY

The office of secretary of state has, at times, been one of great political importance, and has occasionally even overshadowed, to some extent, that of President. Although the secretary is, of course, legally the subordinate of the President and entirely responsible to him for his acts, nevertheless in practice the department chief may, through his dominating personality, be the determining factor in the control of foreign relations. Although the President officially receives diplomatic representatives accredited to this Government, he does not, as a rule, hold communications directly with such representatives on official matters. On the contrary, such communications regularly pass through the hands of the secretary. While the secretary may thus act as the medium of communication between the President and the diplomatic representatives of other coun-

tries, most matters, unless of unusual importance, are handled finally by the secretary himself. Since the ultimate responsibility, however, rests upon the President, he may, when foreign relations become especially important, take their conduct largely into his own hands.

The secretary of state has assumed a rather vague and ill-defined priority over the other members of the President's cabinet. In the compensation which he receives and in his legal status and powers, he has no superiority over them; he does not occupy a position corresponding to that of the prime minister in England and other countries. But, on account of the delicate nature of the duties which he is called upon to perform, he usually enjoys a more confidential relation with the President than do other members of the cabinet. He occupies a seat immediately at the President's right at cabinet meetings. During the period of the "Virginia dynasty," three secretaries of state passed from that office to the presidency, and this gave rise to a popular impression, which long prevailed, that the secretaryship forms a stepping-stone to the presidency. It is usual in Congressional acts to enumerate the secretaryship of state first among the cabinet offices, and by act of 1886 Congress has provided that, in case of vacancy in the offices of both President and Vice President, the succession to the presidency shall pass to the various members of the cabinet, beginning with the secretary of state. If a President or Vice President resigns from office, his resignation should be sent to the secretary of state. In all matters of ceremonial procedure the secretary of state takes priority over the other members of the cabinet. Although legally he has, of course, no control over the appointment of the other members of the cabinet, in practice he is sometimes appointed first by the President from among the leading men of his party and is then consulted in the appointment of the other department heads.

The secretary of state conducts negotiations with foreign

countries either through the diplomatic representatives of those countries accredited to the United States or through the American representatives stationed abroad. The choice between these two methods rests with the nation which takes the initiative in the conduct of negotiations. Ordinarily, it will choose to have them carried on at its own capital.

DEPARTMENTAL ORGANIZATION

The secretary of state not only conducts foreign relations through the channels indicated, but also acts as the central directing authority over officers and employees of the department. Originally the department consisted, besides the secretary, of only two clerks, and there was little or no differentiation of function between them. Gradually, however, as the work increased, the number of clerks grew, and each clerk was assigned to some particular group of duties. This differentiation or division of labor constituted, in embryo, that classification of the work of the department which later brought into existence the various bureaus. There developed, at the same time, a need of greater integration through more general oversight and direction than could be furnished by the secretary alone. Consequently, the offices of assistant secretary of state and second and third assistant secretaries were created by acts of Congress passed in 1853, 1866, and 1874 respectively. The assistant secretaries are appointed by the President, by and with the advice and consent of the Senate. But the duties of oversight and direction which they exercise are such as are assigned to them by the secretary of state, and depend largely upon the character, attainments, and experience of the respective occupants of these offices. Until recently, the assistant secretary has usually succeeded to the office of acting secretary when the head of the department is absent, and, when so acting, he has the same legal powers as the secre-

tary. In consequence he has usually been considered a political officer, who should have the same party affiliation as the President and secretary; while, on the other hand, the second and third assistant secretaries have come to be regarded as permanent officials whose tenure ought not to be, and ordinarily will not be, affected by a change in party control. This difference among the three assistant secretaries in the matter of tenure seems proper in view of the difference in their functions. The assistant secretary does not usually specialize, but exercises general oversight under the secretary, while the second and third assistant secretaries exercise administrative supervision over particular bureaus assigned to them. In addition to the three assistants, attempts have been made from time to time to secure the creation in the department of a permanent undersecretary of state to exercise functions analogous to those of the chief of staff in the war department. As a result of these efforts, the office of undersecretary has now been virtually established in the department. This was brought about, not through any act expressly creating the office, but, in recent appropriation acts of Congress, the title of the office of counselor, originally established in 1909, has been changed to undersecretary of state.

There is also in the department a chief clerk, who is a part of the general administration of the department and exercises supervision over the other clerks in certain matters of a routine character. Much of the work of the department is classified under certain heads and assigned to a number of bureaus, over each of which is a chief, appointed by the secretary. These bureaus are created under the authority of acts of Congress, and their number and titles are changed from time to time. The functions of the department relate partly to foreign affairs and partly to home affairs, and this division is naturally reflected in the organization of bureaus. The work of some, such as the diplomatic and consular bureaus, relates directly and solely to

foreign affairs, while that of others, such as the bureau of rolls and library, and that of indexes and archives, is for the most part concerned with what may be called home affairs. The titles of most of the bureaus indicate in a general way the nature of the work assigned to them. The diplomatic and consular bureaus have charge of correspondence of an administrative character with the members of the diplomatic and consular services respectively. The consular bureau also keeps an efficiency record of members of the consular service, receives the inspection reports of the consuls-general-at-large, and furnishes facilities for giving a month's preliminary instruction to all newly appointed consular officers.[1] The bureau of appointments is charged with such matters as the preparation of exequaturs and warrants of extradition, the receipt of applications for office, the holding of entrance examinations for the foreign service. It also keeps an efficiency record of diplomatic officers for the use of the secretary and asistant secretary.[2] Among the duties of the bureau of citizenship, formerly known as the passport bureau, the most important are the examination of applications for passports, the preparation and issuance of passports, and other matters relating to citizenship, especially of persons who call upon the United States Government for protection while abroad. The bureau of accounts, in addition to its functions relating to the diplomatic, consular, and departmental accounts, also keeps a record of receipts and disbursements on account of indemnity funds received by the United States from foreign governments. The functions of the various bureaus are subject to change from time to time at the order of the secretary. This is in accord with the provision of an act of Congress passed in 1874, as follows: "The secretary of state may prescribe duties for the assistant secretaries, the solicitor, not inter-

[1] *Outline of the Organization and Work of the Department of State*, 54.
[2] *Ibid.*, 63.

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fering with his duties as an officer of the department of justice, and the clerks of bureaus, as well as for all the other employees in the department, and may make changes and transfers therein when, in his judgment, it becomes necessary."

LEGAL FUNCTIONS

A considerable amount of the work carried on by the state department is of a legal character and involves a knowledge both of international and of municipal law. "The foreign policy of the United States must be in accordance with the laws of the United States, and as international law is an integral part of our jurisprudence *(Paquette Habana,* 1899, 175 U. S., 677), it follows that the foreign policy of the United States, in so far as it involves a question of law, rather than courtesy and comity, must be based on international law."[1] Many of the secretaries of state have themselves been able lawyers. The amount of legal work in the department, however, especially in connection with the examination of claims, early became such that in 1848 a clerk was specially assigned to this work, and in 1866 the office of examiner of claims was created. There was some feeling, however, that the presence in the state department of a law officer, advising the secretary in matters affecting our foreign relations, carried with it the possibility of a lack of harmony between such advice and that given to the President and his cabinet by the attorney-general.[2] Consequently, in the act of Congress which, in 1870, established the department of justice, the attempt was made to prevent possible conflict in legal advice relating to foreign affairs by transferring the examiner of claims to the department of justice, although his duties remained a part of the functions of the state department. In 1887, however, Francis

[1] *Am. Jour. Internat. Law,* III, 943 (Oct., 1909).
[2] Learned, *The President's Cabinet,* 189.

Wharton declared that "the law bureau of the department of state is entirely severed in practice and by its duties from the department of justice, nor has its head at any time been subject to the directions of the attorney-general." In 1891 the title of the examiner of claims was changed to "solicitor for the department of state," which is still employed. There are also usually several assistant solicitors and a number of law clerks. Among the legal questions coming before the solicitor and his assistants are those pertaining to diplomatic claims, international extradition, citizenship and expatriation, extraterritoriality, neutrality, belligerency, contraband, asylum, international arbitrations, and the distribution of awards made by commissions. These matters involve many difficult and intricate questions in the fields of constitutional law, admiralty law, and criminal law, as well as all branches of international law.[1]

RECENT REORGANIZATION

Some important changes and additions in the organization of the state department were effected in 1909. Mr. Elihu Root, who was secretary of state at the time, is quoted as having remarked that he was like a man trying to conduct the business of a large metropolitan law-firm in the office of a village squire.[2] The work of the department had grown until its personnel and organization had become inadequate. Among the causes of this development were the increase in our foreign trade (particularly our export trade in manufactured products as differentiated from raw materials), the many questions growing out of the war with Spain, the increasing number of Americans having property interests abroad, the swelling immigration to the United States, and the enactment of the tariff law of 1909, placing upon the President the duty of administering the maximum and min-

[1] *Outline of the Organization and Work of the Department of State,* 29-30.
[2] *The Nation,* Vol. LXXXIX, 294 (September, 1909).

imum tariff rate provision.[1] All of these matters raised questions which had to be given attention by the state department. In order better to fit the department for its enlarged tasks, a reorganization was brought about in 1909 through the creation of a number of new offices and divisions. The most important additions to the staff were the counselor, the director of the consular service, and the resident diplomatic officer. The duties of the counselor "embrace the study and treatment of such questions as may from time to time be referred to him involving advanced legal or other questions and requiring uninterrupted consideration and investigation." [2] The counselor has recently come to be considered the most important officer in the department next to the secretary himself, and has sometimes acted as secretary during the latter's absence.[3]

The creation of the office of resident diplomatic officer represented an attempt to bring about a closer connection between the State Department and the diplomatic service. It was intended that this officer should be a man with considerable diplomatic experience, who should be transferred from the diplomatic service so that the secretary of state may at all times have at hand a man of practical experience in the foreign field, whom he may consult as to important matters of diplomatic policy and to whom he may assign questions for study in the light of actual diplomatic experience.

The reorganization of 1909 also brought about the creation of five divisions in the department, known as the divisions of Latin-American Affairs, Far-Eastern Affairs, Near Eastern Affairs, Western European Affairs, and Information. The first four are special organs created to take care of diplomatic, consular, and miscellaneous correspondence in relation to the principal geographical sections

[1] *Outline of the Organization and Work of the Department of State,* 9-11.
[2] *Ibid.,* 27.
[3] In recent appropriation acts, as indicated above, the title of counselor has been changed to "undersecretary of state."

of the world in which the United States has important interests. This specialization of functions is designed to secure and to train experts in matters of interest to our Government connected with the particular geographical section. The division of information collects and distributes to the diplomatic service information regarding the principal negotiations in progress between the United States and various foreign governments. A suggestion that this practice be adopted was made by Dallas as early as 1857.[1] This division also supervises the publication of the series of volumes known as "Foreign Relations."

In other departments the name "division" is usually given to a unit of organization subordinate to a bureau. But this distinction is not consistently maintained in the department of state; nor is the allotment of authority between divisions and bureaus always clearly defined. This may result in overlapping or conflict. Yet it tends to prevent that inflexibility of organization which sometimes interferes with the highest efficiency. In the state department the exact delimitation of the functions exercised by the divisions and bureaus is subject to change by executive order from time to time. In general, however, the bureaus attend to the administrative functions assigned to them, while the duties of the divisions relate, as a rule, to other than administrative or routine matters.

As already pointed out, the department of state, the diplomatic service, and the consular service are parts of an integral system. Nevertheless, these parts have frequently appeared to be too much separated and disjointed to permit efficient coöperation. An attempt to remedy this condition by bringing about a closer connection between the state department and the higher ranks of the diplomatic service was made through the creation, as already noted, of the office of resident diplomatic officer in the department. A similar attempt to bring about a closer connection be-

[1] Moore, *Digest of Internat. Law*, IV, 782.

tween the department and the lower grades of the diplomatic and consular services was made through the enactment by Congress in 1915 of a law providing that all appointments to the positions of secretary and consul should be to grades and not to posts, and that any such officer might be assigned to duty in the department of state without loss of grade or salary for a period of not more than three or four years.[1]

In spite of the considerable improvement which has recently been brought about in the organization of the state department, it still remains true that both personnel and appropriations are scarcely adequate. Although the secretary of state is usually considered the leading man in the cabinet, his salary of $12,000 is no greater than that received by the other members of the cabinet and is quite insufficient, in view of his living expenses and the social duties incumbent upon him. The outbreak of the European War greatly increased the work and responsibilities of the state department and accentuated the inadequacy of its personnel and financial support. It is only within recent years that either Congress or the country has begun to realize the great importance of the work of the department and the need that it should be adequately supported.

RELATIONS WITH CONGRESS

The relations between the state department and Congress are not as close as they would be under a parliamentary form of government. But they might be closer than they are, even under our presidential form. The secretary of state has no seat in Congress, although one might be accorded to him or to some other representative of the state department without violating the Constitution. The secretary makes no general or regular report to Congress; in-

[1] Act of February 5, 1915, Chap. 23.

rmation regarding diplomatic relations and foreign affairs is usually transmitted to the two houses by the President in his annual message or address.[1] On the other hand, Congress may call upon the secretary for correspondence or other information relating to the work of his department, and this information is usually furnished if not incompatible with the public interests. The secretary, furthermore, may appear upon invitation and make statements before committees of Congress. It is obviously wise for him to keep in close touch with the Senate Committee on Foreign Relations, especially in connection with the negotiation of treaties. Harmonious relations between Congress and the state department will usually prevail if the party of the administration also controls Congress. It will greatly help if the secretary of state has previously been a member of the national legislature.

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[1] Secretary Olney, however, made such a report and President Cleveland transmitted it to Congress in like manner with reports of the other departments. Hinsdale, *History of the President's Cabinet*, 307.

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CHAPTER IV

DIPLOMATIC INTERCOURSE: PERSONNEL

UNDER the Articles of Confederation the power of sending and receiving ambassadors was vested in Congress, and the states were prohibited from engaging in diplomatic intercourse without the consent of that body. Strictly construed, the language of the Articles would have enabled Congress to appoint only the highest grade of public minister. In practice such a construction was not adhered to.[1] But this defect was remedied in the present constitution by including "other public ministers and consuls" among the officers who may be sent abroad by our Government. In regard to the method of appointment the Constitutional Convention of 1787 considered for some time a proposal to vest in the Senate the power to appoint ambassadors and other public ministers. Gouverneur Morris, however, argued against such a mode of appointment. He considered the Senate as "too numerous for the purpose; as subject to cabal; and as devoid of responsibility."[2] In the final draft, the power of appointing ambassadors and other public ministers and consuls was conferred upon the President, "by and with the advice and consent of the Senate," while the power of receiving ambassadors and other public ministers was vested in the President alone.

CREATION OF DIPLOMATIC OFFICES

Diplomatic offices are created by the Constitution, by international law, or by act of Congress and cannot be created by the President, as this is properly a legislative

[1] Madison, in *Federalist*, No. 42.
[2] Farrand, *Records of the Federal Convention*, II, 389.

power.[1] The power of Congress to create offices arises from the clause of the Constitution enabling that body to pass all laws which may be necessary and proper for carrying into execution the powers of any officer or department of the Government. With reference to the President's power of appointing officers whose appointments were not otherwise provided for in the Constitution, Madison moved in the Convention, on August 24, 1787, to amend by striking out "officers" and inserting "to offices," in order to "obviate doubts that he might appoint officers without a previous creation of the offices by the Legislature;" and the motion was carried.[2] On September 8 Gerry moved that "no officer be appointed but to offices created by the Constitution or by law." But by a close vote this was rejected as being unnecessary.[3] It has been stated that the question whether the President may, on his own initiative, appoint an ambassador, public minister, or consul when Congress has not created those offices, is one which cannot be regarded as settled.[4] It would seem, however, that the provision of the Constitution vesting in the President and Senate the appointment of these officers is sufficient authority to enable them to act, even though Congress has not passed a law specifically creating such offices. This, at any rate, appears to have been the construction placed upon that provision in practice during the early years of the Constitution.

Despite the apparently inconsistent position which he had taken in the Convention, Madison was of the opinion in 1822 that "the practice of the government had, from the beginning, been regulated by the idea that the places or offices of public ministers and consuls existed under the law and usages of nations, and were always open to receive appointments as they might be made by competent authorities." [5]

[1] Willoughby, *Constitutional Law of the United States*, II, 1178.
[2] *Journal* (Hunt ed.), II, 246.
[3] *Ibid.*, II, 335.
[4] *Tucker on the Constitution*, II, 736.
[5] 3 Madison's Works, 267, quoted in Moore, *Digest of Internat. Law*, IV, 451.

Attorney-General Cushing took practically the same position in 1855, declaring it to be the "undeniable fact that 'public ministers' as a class are created by the Constitution and law of nations, not by act of Congress. No act of Congress created the offices of minister to [the various countries], to which ministers were sent by President Washington."[1]

APPOINTMENT OF DIPLOMATIC REPRESENTATIVES

In 1789 Congress passed an act creating the department of foreign affairs and providing that the secretary of the department should perform such duties respecting foreign affairs as the President might enjoin on or entrust to him.[2] No act of Congress was passed, however, providing for the maintenance of diplomatic representatives abroad until July 1, 1790, when the President was authorized by law "to draw from the Treasury a sum not exceeding forty thousand dollars annually, for the support of such persons as he shall commission to serve the United States in foreign parts, and for the expense incident to the business in which they are employed."[3] Prior to the passage of this act, however, President Washington had commissioned William Short as *chargé d'affaires* in France and William Carmichael in Spain. "In each of these cases, the designation of the officer was derived from the law of nations, and the authority to appoint from the Constitution."[4] The power to appoint diplomatic agents, declared Attorney-General Cushing in 1855, "is a constitutional function of the President, not derived from, not limitable by, Congress, but requiring only the ultimate concurrence of the Senate; and so

[1] 7 Op. U. S. Att.-Gen., 212.
[2] 1 Stat. at L., 28. Shortly afterwards the name was changed to Department of State.
[3] *Ibid.*, 128.
[4] 7 Op. U. S. Att.-Gen., 194.

it was understood in the early practice of the Government." [1]

The Constitution does not undertake to enumerate the various grades of diplomatic officers. The term "public ministers," however, as used in the Constitution, is sufficiently comprehensive to embrace all grades and ranks of diplomatic agents. Our Government adopted, in part, the system of diplomatic grades and ranks which it found in vogue among other civilized nations, and the State Department has reiterated the rules in reference to this matter which were drawn up at the Congresses of Vienna and of Aix-la-Chapelle in 1815 and 1818 respectively.[2] From 1790 to 1818, Congress continued to vote lump sum appropriations for diplomatic intercourse in general acts. That body made no attempt during these years to create diplomatic offices or to determine ranks or grades, although in some of the appropriation acts certain grades of diplomatic agents, *e.g.*, ministers plenipotentiary and *chargés d'affaires* were mentioned. The practice during this time "recognized the right and power of the President to designate, and with the consent of the Senate, appoint, public ministers of any rank or denomination which the public interest might require. . . . Indeed, many of the early appointments are of a title of designation deliberately different from those expressly named in the acts of Congress." [3] Beginning in 1818, the names of the existing or anticipated diplomatic missions are introduced into the appropriation acts, and certain sums of money are allotted to each; but, in addition, a contingent fund is placed at the disposal of the President.[4]

In 1826 opposition developed in Congress to the proposal of President Adams to send envoys extraordinary and ministers plenipotentiary to the Congress of Panama, on the ground that no such officers were known to the Constitution

[1] 7 Op. U. S. Att.-Gen., 193.

[2] *Instructions to Diplomatic Officers of the United States*, sects. 18-20; Moore, *Digest of Internat. Law*, IV. 430.

[3] 7 Op. U. S. Att.-Gen., 195-6.

[4] 3 Stat. at L., 422.

or to the law of nations. Martin Van Buren proposed a resolution in the Senate declaring that the Constitution authorizes nomination and appointment to offices of a diplomatic character only, existing by virtue of international laws, and does not authorize the appointment of representatives to an assembly of nations.[1] The Senate nevertheless confirmed the appointments, although no such offices had been created by act of Congress; and Congress subsequently sanctioned the proceedings by appropriating the necessary funds for the mission.

Although under the power vested in him by the Constitution the President doubtless might, from the beginning, have appointed diplomatic representatives of the grade of ambassador, none such were appointed prior to 1893. In that year Congress passed an act providing that "whenever the President is advised that any foreign government is or is about to be represented in the United States by an ambassador," etc., "he is authorized, in his discretion, to direct that the representative of the United States to such government shall bear the same designation."[2] In 1909 Congress went farther and provided that "hereafter no new ambassadorship shall be created unless the same shall be provided for by act of Congress."[3] Since the passage of this act, Congress has at various times assumed to authorize the President to appoint ambassadors to various countries, such as Spain, Chile, and Argentina.[4]

These acts, however, are not to be construed as valid limitations upon the power of the President to appoint diplomatic representatives. In 1855 Congress passed an act which purported to require that the President should appoint to certain countries representatives of certain grades. Attorney-General Cushing, however, properly held that this provision must be regarded, not as mandatory, but

[1] Senate Exec. Jour., III, 516 (March 14, 1826).
[2] 27 Stat. at L., 497 (March 1, 1893).
[3] 35 Stat. at L., 672.
[4] 38 Stat. at L., 110, 378.

as merely directory or recommendatory.[1] The same characterization may be made of the acts of 1893 and of 1909, mentioned above. The discretion of the President as to whether it is expedient to maintain a representative of a certain grade at a certain post cannot be legally controlled by Congress, nor can he be required to maintain any representative whatever at a given foreign capital if he thinks it expedient to leave the post vacant. Suppose the Senate rejects the nomination of a person whom the President thinks suitable to be appointed to a diplomatic position. Can Congress compel him to nominate a person who is satisfactory to the Senate rather than leave the place vacant? Or, suppose that the President considers the attitude of a foreign government toward the United States so unfriendly as to justify us in leaving vacant the position of our diplomatic representative accredited to it, or in maintaining at that post a representative of an inferior grade in order to show our displeasure. Can Congress nevertheless compel the President to keep the place filled by the appointment of a representative of a higher grade? These questions are manifestly to be answered in the negative. The President is, however, dependent upon Congress for securing the necessary appropriation to pay to a diplomatic representative a salary commensurate with his grade, and this enables Congress to exercise a practical control over the matter, qualified to some extent, however, by the practice of maintaining a contingent fund at the President's disposal.[2]

The process of appointment to office consists of three steps: (1) nomination, (2) confirmation, *i.e.*, the granting of the "advice and consent" of the Senate to the appoint-

[1] 7 Op. Att.-Gen., 189-229.

[2] There seems to have been at times some opposition in Congress to providing the President with a contingent fund for foreign intercourse. Maclay records in his journal that in 1790 Jefferson, then secretary of state, appeared before a Senate committee, and, as a result of his illuminating exposition of diplomatic methods in Europe, the committee agreed to strike out the specific sum to be given to any foreign appointment, leaving a lump sum to the President for foreign intercourse. *Journal*, p. 272.

ment, and (3) signing the commission. Chief Justice Marshall held, in Marbury *v.* Madison, that the appointment was complete when the commission was signed and that the delivery of the commission could, in proper cases, be compelled by mandamus.[1] Of the three steps in the process, the President controls the first and third, while the second only devolves upon the Senate. In taking the first and third steps, the action of the President is voluntary. He cannot be legally compelled to sign a commission, even though the Senate has given its advice and consent to the appointment.[2] Some question was raised during the early years under the Constitution as to whether the Senate has the right to participate in the first step by suggesting names to the President. This view, however, did not prevail, since the language of the Constitution which associates the President and Senate in the appointing power clearly implies that the President has the sole right of nomination, and that the advice and consent of the Senate operate only upon the confirmation of the appointment. The President may, however, voluntarily consult with influential members of the Senate in regard to nominations, and the requirement of Senatorial confirmation in order to validate an appointment may exert an indirect or retroactive influence over the President's action.[3]

The question may be raised whether the action of the Senate in rejecting a nomination made by the President is to be regarded as a final and conclusive determination of the matter. In other words, may the President renominate the same person for the same place? In 1834 President Jackson nominated Andrew Stevenson to be minister to Great Britain, but the Senate refused to approve. The President

[1] 1 Cr. 156.

[2] In Marbury *v.* Madison, however, Chief Justice Marshall remarked: "To grant a commission to a person appointed might, perhaps, be deemed a duty enjoined by the Constitution."

[3] A majority vote in the Senate is sufficient to confirm appointments, so that action on nominations to office is, as a rule, more easily secured than on treaties, when a two-thirds vote of the senators present is required.

then allowed the post to remain vacant for almost two years. Finally, in 1836, he again sent in the nomination of Stevenson for the place. With reference to this renomination, Henry Clay, from the Committee on Foreign Relations, made a report recommending the rejection of Stevenson's renomination and stating it to be the opinion of the Committee that the practice of renomination was subject to serious abuses and that when the Senate has once rejected an individual nomination the decision ought to be held as final and conclusive.

"The Senate," continued the report, "is supposed to be, by the theory of the Constitution, as free and independent in the exercise of its judgment on nominations submitted to its consideration as the President is in proposing them. Each of the two components of the appointing power acts upon its own sense of duty and upon its own responsibility. The Senate has no right to require the President to nominate any particular individual, and the President has no right to require the Senate to confirm any particular nomination. When the Senate has once decided upon a nomination, there ought to be an end to the matter."[1]

The Senate could, of course, reject a renomination precisely as any other nomination; or it might fail to act upon it at all, which would have the same result. A settled practice on the part of the Senate to reject renominations would doubtless have the practical effect of deterring the President from making them. But the discretion of the President in making a renomination as often as he pleases cannot be legally controlled, save, of course, by an amendment to the Constitution.

QUALIFICATIONS OF DIPLOMATIC OFFICERS

Congress has sometimes attempted to lay down legal qualifications for diplomatic and consular officers. Thus an

[1] Senate doc. 231, 56th Cong., 2nd sess., part 4, p. 33; Senate Exec. Jour., IV, 516 (March 3, 1836). On motion of Clay, the Senate ordered that the nomination of Stevenson be tabled (*Ibid.*, 516).

act of 1855 provided "that the President shall appoint no other than citizens of the United States . . . as envoys extraordinary and ministers plenipotentiary, . . . consuls or commercial agents." [1] Similar provisions requiring that none but American citizens shall be appointed to designated diplomatic and consular offices have been incorporated in subsequent acts of Congress. The requirement of such a qualification constitutes an attempted limitation upon the free exercise of the appointing power, and the question may be raised whether the discretion of the President and Senate may, consistently with the Constitution, be thus circumscribed. Attorney-General Cushing held that such a provision in an act of Congress is recommendatory only, and not mandatory. "The limit of the range of selection," he said, "for the appointment of constitutional officers depends on the Constitution. . . . The President has absolute right to select for appointment." [2]

The same question has come up in connection with the application of the merit system to appointments in the civil service. Certainly Congress could not legally limit the power of the President and Senate to the appointment of such persons only as receive the highest grade in a competitive examination and are so certified by a civil service commission, since this would amount to a transfer of the power of appointment to the commission. The right of Congress to create offices may be construed to imply the right of prescribing qualifications for them, but this right "is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment." [3] The President may, however, by executive regulations, voluntarily limit his nominations to such persons as may pass an examination after being designated by him to take it. It has also been held that the President may, under authority derived from Congress,

[1] Act of March 1, 1855, sect. 9.
[2] 7 Op. Atty.-Gen., 215, 267.
[3] 13 *ibid.*, 520.

issue such regulations even with reference to positions in the civil service which by law are to be filled by appointees of a head of an executive department.[1] By executive orders of 1906 and 1909, such regulations have been issued by the President with reference to certain grades of diplomatic secretaries and consuls.[2] These orders also provided that none but citizens of the United States shall be eligible to take the examinations.

Attorney-General Akerman, in 1871, gave a more liberal construction of the power of Congress in prescribing qualifications for office than had been allowed by Attorney-General Cushing. It was held by the former that Congress could require that officers shall be of American citizenship or of a certain age, and still leave a reasonable scope for the exercise by the appointing power of its own judgment and will.[3] If any limitation upon such scope not found in the Constitution itself is allowed, however, it is difficult to see where the line should be drawn. The better view would seem to be that of Attorney-General Cushing that qualifications, such as age and citizenship, required by acts of Congress are only recommendatory. They should, of course, be treated by the President with the respect due to the opinions of a coördinate branch of the Government, but not as compulsory if, in his judgment, it is inexpedient to observe them. Congress, however, could limit the payment of compensation for their services to such appointees as possess the qualifications prescribed by law. It has, in fact, adopted this course and has stipulated that no compensation provided for diplomatic officers shall be applicable to persons holding such offices who are not citizens of the United States.[4] It is doubtful whether the President could legally provide compensation for such persons from his contingent fund, for, under the general rules of statutory construction,

[1] 13 Op. Atty.-Gen., 524.
[2] Executive Orders of June 27, 1906, and November 26, 1909.
[3] 13 Op. Atty.-Gen., 525.
[4] 11 Stat. at L., 60; R. S., sect. 1744; cf. R. S., sect. 1760.

an express provision that no compensation should be paid to an officer not having the qualifications prescribed by Congress would be construed as an exception to a general grant to the President of a lump sum to be used as a contingent fund.[1]

Another question which may be considered in this connection relates to the power of the President to appoint a member of the Senate or of the House of Representatives to a diplomatic position. With a view to keeping the legislative and executive departments of the Government separate, as well as avoiding such abuses as were thought to have grown up in England through appointment of members of Parliament to office, the framers of our Constitution prohibited a Senator or Representative from holding any office under the United States, or from accepting such an office, if civil in character, during the time for which he was elected, if the office were created or its emoluments increased during such time.[2] In spite of this provision, however, members of Congress have sometimes been nominated to diplomatic positions, although not without some opposition among their colleagues.

The question here involved has come up in two forms: (1) with reference to the appointment of members of Congress to regular or, comparatively speaking, permanent diplomatic positions, and (2) with reference to their appointment on special or temporary missions to accomplish particular objects, such as the negotiation of a treaty of peace. An incident illustrative of the attitude of members of the Senate toward appointments of the first class occurred in connection with the nomination by President Jackson in 1834 of Andrew Stevenson to be our minister to Great Britain. Mr. Stevenson was, at the time of his nomination,

[1] Evasion by the President, however, of Congressional stipulations in this respect, through payments to persons without the prescribed qualifications from the secret fund on presidential certificates, could probably be disclosed only in impeachment proceedings.

[2] Art. I, sect. 6, cl. 2.

Speaker of the House of Representatives. His nomination was rejected by the Senate, and, in a report subsequently made by Henry Clay from the Committee on Foreign Relations, opposition to his appointment was based, in part, upon his membership in Congress.

"It is a fundamental principle of free governments," declared the report, "that, in order to preserve the purity of their administration, each of the three departments into which, according to all safe maxims, they are divided, should be kept independent of, and without the influence of the other. But, if the head of one of these departments may, at a critical period, confidently present, and for a long period of time hold up to the presiding officer of the popular branch of the other, the powerful inducement of a splendid foreign mission, is there not imminent danger of undue subserviency—of a failure of that presiding officer faithfully and independently to discharge the high duties of his exalted station?"[1]

Although there might be some danger of the abuse to which this report refers, there is no constitutional objection to a member of Congress, after resigning his legislative position, accepting appointment to a regular diplomatic office which has not been created and whose emoluments have not been increased during the time for which he was elected.

In the second place, the question has been raised as to the legality, or at least the propriety, of a member of Congress, without resigning from that body, accepting appointment on a special diplomatic mission, such as one deputed to negotiate a treaty of peace. On the commission to negotiate the Treaty of Ghent in 1814, President Madison appointed, with the advice and consent of the Senate, James A. Bayard, a member of the Senate, and Henry Clay, at that time Speaker of the House. Both men, however, evidently considered their new duties incompatible with mem-

[1] Senate doc. 231, 56th Cong., 2nd sess., part 4, p. 32; Senate Exec. Jour., IV, 515 (March 3, 1836).

bership in Congress, because they resigned from that body. On the commission to negotiate the treaty of peace with Spain in 1898 President McKinley appointed three members of the Senate, one being president *pro tem.* of that body and another being chairman of the committee on foreign relations. Their names were not submitted to the Senate for confirmation, nor did they resign from that body. The President appointed them, however, during a recess of the Senate, and the negotiations were practically completed during this interim.

The President's appointment of members of the Senate to conduct negotiations led to the introduction in the upper house of a resolution and a bill expressing disapproval of the practice. In order not to cast reflection upon the particular senators appointed by the President, the resolution and bill were not reported by the committee on the judiciary, to which they were referred. But Senator Hoar, chairman of the committee, was instructed to confer with the President and to protest against the practice. At the interview the President gave a qualified assurance that the practice would be discontinued.[1] In 1898 the Senate declined to confirm the appointment of three of its members as members of the Hawaiian Commission. Nevertheless, the three served on the commission as mere Presidential appointees.[2] The question arose again in 1903 upon a proposed amendment to the Sundry Civil Appropriation Bill providing that senators and representatives should be ineligible for service on foreign missions. The amendment failed to pass, but the debate upon it in the Senate indicated that the opinion of that body was strongly opposed to the service of senators on such missions, especially when they were appointed to negotiate treaties which must later come before the Senate for action, since it might give the President an undue influence over the Senate.

[1] Cong. Record, February 26, 1903, vol. 36, p. 2698.

[2] *Ibid.*, 2695. The members of the Senate who served on this commission received no compensation beyond their salaries as senators.

The argument of unconstitutionality was also brought forward in this debate against the practice in question. Senator Bacon declared that it was "distinctly in opposition to the express policy, if not the express command, of the Constitution." At the same time, however, he indicated the basis upon which the practice may be defended against this charge: "The only possible escape from the [constitutional] prohibition is to say that a position on one of those commissions is not an office."[1] The persons designated by the President to serve on special missions to negotiate treaties need not be considered officers of the United States. The power of the President to appoint commissioners to negotiate treaties rests, not upon his power to appoint officers, but upon his power to negotiate treaties. The President merely employs agents to perform certain specific duties under his direction. Such persons receive no fixed compensation authorized by law, but are paid, if at all, out of the contingent fund placed at the disposal of the President. Although the President may voluntarily send their nominations to the Senate, this is not done as a rule, and the constitutional requirement as to the confirmation by the Senate of Presidential appointments is not applicable.

PRESIDENTIAL APPOINTMENT WITHOUT SENATORIAL CONFIRMATION

Under the Constitution, Congress is empowered to vest the appointment of "inferior" officers in the President alone or in the heads of departments. In pursuance of this power Congress has vested the appointment of certain persons in the lower grades of the consular service, such as vice-consuls, consular clerks, and student interpreters, in the President alone or in the Secretary of State.[2] The power to appoint these inferior officers, however, is of minor significance. A more important power is that which

[1] Cong. Record, February 26, 1903, vol. 36, p. 2696.
[2] Revised Statutes, sect. 1704; 24 Op. U. S. Atty.-Gen., 52.

the President has developed of appointing special diplomatic agents without the confirmation of the Senate. Such Presidential agents may, in general, be divided into (1) those designated to negotiate a treaty and (2) those designated for other purposes connected with the general conduct of our foreign relations.[1]

During the first quarter-century of our history under the Constitution the President repeatedly sent to the Senate for confirmation the names of persons nominated by him to negotiate treaties. There were several instances during this period, however, in which the President appointed special agents for this purpose without Senatorial confirmation. Thus on October 13, 1789, President Washington sent Gouverneur Morris to Great Britain as a private agent to negotiate a treaty of commerce, and on March 2, 1793, he commissioned David Humphreys to negotiate with Algiers. Since 1815 the instances in which the President has sent to the Senate the names of persons designated to negotiate treaties have been exceptional. An investigation of this subject was made in 1888, and the results were published in the minority report of the Senate committee on foreign relations relative to the proposed fisheries treaty with Great Britain. According to this compilation, 473 persons were employed by the United States in conducting negotiations from 1789 to 1888. Of these thirty-two were appointed by the President with the advice and consent of the Senate, three were appointed by the Secretary of State, and 438 were appointed by the President alone.[2] Between 1888 and 1891, the names of treaty commissioners were submitted to the Senate in three instances. But since the latter date,

[1] For lists of cases of Presidential appointments without Senatorial confirmation, see Moore, *Digest of Internat. Law*, IV, 452-457; Foster, *Practice of Diplomacy*, 198-203; and Wriston, "Presidential Special Agents in Diplomacy," *Am. Pol. Sci. Rev.*, X, 481-499 (Aug., 1916).

[2] Senate doc. 231, 56th Cong., 2nd sess., part 8, pp. 337-362. Between 1827 and 1880 no names of treaty negotiators were sent to the Senate. *Ibid.*, p. 333. It should be noted, however, that some of the 438 cases in which persons were appointed by the President alone were recess appointments which the Senate subsequently confirmed.

there have been no cases of the sort.[1] With reference to such appointments, the minority report mentioned says:

"The constitutional power of the President to select the agents through whom he will conduct such business is not affected by the fact that the Senate is or is not in session at the time of such appointment or while the negotiation is being conducted, or the fact that he may prefer to withhold, even from the Senate, or from other countries, the fact that he is treating with a particular power or on a special subject. The secret-service fund that Congress votes to the Department of State annually is that from which such agents are usually paid. That is the most important reason for such appropriations."[2]

As illustrative of the practice of the President in sending special agents without Senatorial confirmation, a few instances may be specifically mentioned. In 1817 President Monroe sent three commissioners to the rebelling Spanish-American colonies to inquire into conditions with a view to recognition of their independence. The names were not sent to the Senate, although that body was in session when the commissioners sailed. In this case it would not have been appropriate to appoint regular diplomatic representatives, since there was no independent government to which they could be accredited. A special item in the diplomatic appropriation bill was inserted for the salaries and expenses of the commissioners; but, on objection made by Henry Clay on the ground that the appointees had not been confirmed by the Senate, it was stricken out, and provision was made for their compensation out of the contingent fund under the head of incidental expenses.

In 1847 President Polk ordered Nicholas Trist to Mexico on a secret mission to negotiate a treaty of peace, should he find the conditions favorable. Trist was also given extraor-

[1] House rept. 387, 66th Cong., 1st sess., part 2, p. 5, in which it is pointed out that in only thirty-five instances has the President sent the names of treaty negotiators to the Senate, while in between 500 and 600 instances he has made the appointment without the advice and consent of the Senate.

[2] Sen. doc. 231, VIII, 333.

dinary powers with reference to the direction of military and naval operations. Although recalled, he persisted in negotiating the treaty of Guadeloupe Hidalgo, which was subsequently ratified.

It may, of course, and frequently does, happen that general diplomatic or treaty negotiations are conducted, not by mere Presidential agents, but by the Secretary of State or by the regular diplomatic representatives of the United States at foreign capitals, whose appointments have been confirmed by the Senate. In the case of the Secretary of State, however, the Senate, by custom, usually confirms without question whomsoever the President may nominate to that office, while the action of the Senate upon the nominations both of the Secretary and of the regular diplomatic representatives is usually taken without regard to, or even without knowledge of, any particular negotiations which they may be called upon to conduct in the course of their duties. It sometimes happens, however, in the case of important or delicate negotiations, that the President prefers to entrust them to specially selected agents rather than to the regular diplomatic representatives. Thus in 1901, while the Senate was in session, President McKinley, without confirmation by that body, commissioned W. W. Rockhill as plenipotentiary to negotiate a treaty for the settlement of the Boxer troubles. The best known instance of this sort, however, occurred in 1893, when J. H. Blount was appointed by President Cleveland, without Senatorial confirmation, as a special commissioner to the Hawaiian Islands with powers which, in all matters affecting the relations of the United States to the islands, were declared in his instructions to be "paramount" to those of the regular minister. This unusual procedure aroused criticism in the Senate, and a minority of the foreign relations committee of that body denounced it as unconstitutional.[1] It was also declared by an outside observer that, "if the President may appoint a

[1] Senate doc. 231, 56th Cong., 2nd sess., part 6, p. 395.

diplomatic agent with paramount power, the office of the Senate in the appointing power is superfluous.'"[1] The President's action, however, was upheld by the majority report of the Senate committee, as follows:

"A question has been made as to the right of the President to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information which the President believed was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such power has been exercised by the President on various occasions without dissent on the part of Congress or the people of the United States. The employment of such agencies is a necessary part of the proper exercise of the diplomatic power which is entrusted by the Constitution with the President. Without such authority our foreign relations would be so embarrassed with difficulties that it would be impossible to conduct them with safety or success. These precedents also show that the Senate, though in session, need not be consulted as to the appointment of such agents, or as to the instructions which the President may give them."[2]

The majority of the committee thus upheld the practice of the President in this respect not only on the ground of precedent, but also on the basis of necessity. The argument from necessity is also potent where, as sometimes happens, the President deems secrecy in negotiations indispensable to their success.[3] The practice has also been upheld on the ground that it is implied in the President's initiative in foreign affairs and also in Congressional appropriation acts.[4] The President very largely controls the means of conducting treaty and other negotiations, and there would seem to be no constitutional limitation to prevent him from

[1] F. N. Thorpe, "Can the President Appoint Paramount Diplomatic Agents Without the Consent of the Senate?" *Am. Law Register*, N. S., XXXIII, 262. See also, *ibid.*, 177 ff.

[2] Senate doc. 231, 56th Cong., 2nd sess., part 6, p. 387.

[3] Cf. remarks of James Buchanan, in Cong. Globe, IX, 473, quoted by Wriston, *Am. Pol. Sci. Rev.*, X, 487.

[4] Wriston, *loc. cit.*, 482-488.

negotiating a treaty in person. When the President thus acts in person, it is not a case of self-appointment, but rather the performance of the constitutional function directly instead of through agents.[1]

Some express Congressional authority may perhaps be found for the appointment of Presidential agents. Thus, by act of March 3, 1897, Congress authorized the President, whenever he should determine that the United States ought to be represented at an international conference on bimetallism, to appoint five or more commissioners to such conference and appropriated a lump sum for the compensation and expenses of such commissioners. Congress may, of course, vest the appointment of inferior officers in the President alone, but the commissioners provided for by this act could hardly be classed as inferior officers, since their positions were lacking in the characteristics of an office, which have been described as embracing the ideas of "tenure, duration, emolument and duties." It was rather a transient or occasional employment.[2]

Congressional authority for the appointment of Presidential agents, however, is usually found in occasional acts providing special or additional compensation for such

[1] Cf. the following remarks of Senator Spooner in his debate in the Senate in 1906 with Senator Bacon: "He [the President] may employ such agencies as he chooses to negotiate the proposed treaty. He may employ the ambassador, if there be one, or a minister or a *chargé d'affaires,* or he may use a person in private life who he thinks by his skill or knowledge of the language or people of the country with which he is to deal is best fitted to negotiate the treaty. He may issue to the agent chosen by him—and neither Congress nor the Senate has any concern as to whom he chooses—such instructions as seem to him wise. He may vary them from day to day. That is his concern. The Senate has no right to demand that he shall unfold to the world or to it, even in executive session, his instructions or the project or progress of the negotiation. I said 'right.' I use that word advisedly in order to illustrate what all men who have studied the subject are willing to concede—that under the Constitution, the absolute power of negotiation is in the President and the means of negotiation subject wholly to his will and judgment." Quoted in Corwin, *President's Control of Foreign Relations,* 171-2.

[2] See U. S. *v.* Hartwell, 6 Wall., 385, 393, quoted by Willoughby, *Constitutional Law of the U. S.,* 528, and the opinion of the attorney-general that a delegate to the International Conference of American States is not an officer of the United States. 23 Op. Atty.-Gen., 533, quoted by Moore, *Digest of Internat. Law,* IV, 440. Cf. also U. S. *v.* Germaine, 99 U. S., 508, 512 and U. S. *v.* Mouat, 124 U. S., 303.

agents and more especially by implication in a series of acts beginning with that of July 1, 1790, providing a contingent fund for foreign intercourse at the disposal of the President, and in a provision of those acts now incorporated in the Revised Statutes allowing payments to be made from such contingent fund on Presidential receipts or certificates without vouchers specifically accounting for such expenditure.[1]

Although Congressional authority thus exists, at least by implication, for the appointment of Presidential special agents, nevertheless that practice has not escaped occasional opposition from Congress and from the Senate. In 1882, the President negotiated a treaty with Corea through a naval officer as his special agent.[2] In advising and consenting to the ratification of the treaty, the Senate attached a reservation to the effect that it did not thereby

"admit or acquiesce in any right or constitutional power in the President to authorize or empower any person to negotiate treaties or carry on diplomatic negotiations with any foreign power, unless such person shall have been appointed for such purpose or clothed with such power by and

[1] R. S., sect. 291. This provision is as follows: "Whenever any sum of money has been or shall be issued from the Treasury, for the purposes of foreign intercourse or treaty with foreign nations in pursuance of any law, the President is authorized to cause the same to be duly settled annually with the proper accounting officers of the Treasury, by causing the same to be accounted for, specifically, if the expenditure may, in his judgment, be made public; and by making or causing the Secretary of State to make a certificate of the amount of such expenditure as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended." This provision thus enables the President to maintain a secret service fund, without specifically accounting for expenditures therefrom.

A request made by the House of Representatives through House resolution of Apr. 9, 1846, calling upon the President for information in regard to expenditures on presidential certificates made by his predecessors was refused by President Polk. See his message in Richardson, *Mess. and Pap. of the Presidents,* IV, 431-6; E. C. Mason, "Congressional Demands upon the Executive for Information," *Papers of Am. Hist. Assoc.,* V, 370; and Hinds, *Precedents,* II, 1026. In 1911, President Taft issued an executive order forbidding the Secretary of State or any other officer or employee in the State Department to give information concerning moneys expended and accounted for by certificate, except upon direction of the President. Order No. 1382, July 7, 1911. Cf. the President's executive order No. 1062 of Apr. 14, 1909, cited above, p. 19.

[2] Paullin, *Diplomatic Negotiations of American Naval Officers,* 320.

with the advice and consent of the Senate, except by the Secretary of State or diplomatic officer appointed by the President to fill a vacancy during the recess of the Senate."[1]

The question may be raised whether Congress could curb the practice of the President in appointing special diplomatic agents by passing an act requiring that such agents or delegates should be appointed by and with the advice and consent of the Senate. In 1919 an amendment was adopted to a House bill authorizing the President to call an international telegraphic conference and to appoint delegates thereto, requiring that such appointments should be made by and with the advice and consent of the Senate.[2] With reference to this amendment, reports were made from the House Committee on foreign affairs. The majority report defended the amendment, on the ground that one of the purposes of the conference was to draft a treaty and that there were precedents for the Senate's confirmation of treaty negotiators.[3] It is true, as we have seen, that the President has sometimes sent the names of treaty negotiators to the Senate for confirmation. When he has done so, there has usually been political harmony between him and the upper house. In this way he may virtually consult the other branch of the treaty-making body in advance. In confirming the nominations the Senate practically authorizes the commencement of negotiations, and, although not thereby committing itself to the approval of the results, it is likely to look with a more favorable eye upon the project of a treaty framed by negotiators in whose appointment it has had some share. As was pointed out in the minority report of the committee, however, the cases in which the President has voluntarily sent the names of treaty negotiators or

[1] Malloy, *Treaties*, etc., I, 340. A Senate resolution of similar import was tabled in 1834. Sen. Exec. Jour., IV, 413, 445.

[2] Cong. Record, October 22, 1919, vol. 58, p. 7348. The amendment was carried in the House by a vote of 161 to 125.

[3] House rept. 387, 66th Cong., 1st sess.

other special agents to the Senate for confirmation do not constitute a precedent for an act of Congress requiring him to do so.[1] If Congress by act constitutes the position of a delegate to an international conference an office under the United States and attaches thereto a definite salary, it can doubtless require the President to submit nominations to the Senate. But it is difficult to see how compliance with the act could be compelled by any means short of impeachment, so long as the delegate is paid from the contingent fund on Presidential certificates, or is willing to serve without compensation. Such an act would be indicative of the opinion of Congress and entitled to respect, but it would not necessarily be mandatory upon the President. Whatever treaty should be negotiated by the President's appointees would have to be submitted to the Senate for its advice and consent, so that the rights of that body would ordinarily be sufficiently safeguarded. Congress might, however, provide that no compensation should be paid out of the public funds to delegates to an international conference unless the Senate has advised and consented to their appointment, and this would probably have controlling effect as to the compensation of such delegates, even though a contingent fund for the general purpose of foreign intercourse should at the same time be provided.[2]

A reaction against what was considered to be an undue use by President Wilson of special agents in conducting our foreign relations was indicated by the language of one of the proposed reservations to the Treaty of Versailles adopted by the Senate in November, 1919, providing that no person should represent the United States in the assembly or council of the League of Nations unless Congress should have provided for his appointment and defined

[1] House rept. 387, 66th Cong., 1st sess., part 2, p. 4.

[2] By an act of 1810 Congress provided that no *chargé d'affaires* nor secretary of embassy or legation should be entitled to compensation unless appointed by the President, by and with the advice and consent of the Senate. 2 Stat. at L., 608; R. S., sect. 1684.

his powers and duties. The reservation also provided that no citizen of the United States should be appointed as a member of the various commissions or other bodies under the treaty except with the approval of the Senate. Whatever practical justification there may have been for this proposed reservation, it manifestly ran counter to the Constitution in several respects. It undertook to place, through the treaty-making process, a limitation upon the constitutional power of Congress to provide for the appointment of inferior officers by the President alone. Such an attempted limitation could not, however, be legally binding upon Congress. The proposed reservation was also unconstitutional in so far as it purported to place a restriction upon the President's power to fill vacancies during the recess of the Senate.[1] Although the regular and permanent representatives of the United States on such a body as the assembly or council of the League of Nations would doubtless fall within the category of officers, and their appointments would therefore require Senatorial approval unless designated by Congress as inferior officers, it might be appropriate, in some cases, for the President to employ special agents temporarily on some of the subordinate commissions or other bodies to be created under the treaty. The objections to the proposed reservation were evidently, to some extent, recognized by the Senators in charge, since it was subsequently modified so as to eliminate the requirement regarding Senatorial approval.[2]

The appointment by the President of special diplomatic agents is doubtless to some extent an anomalous practice, and one scarcely authorized by the theory of the Constitution. It may be used by the President as a means of safeguarding his initiative in foreign relations from invasion by the Senate, and it may be justified in certain cases,

[1] Speech of Senator Walsh of Montana, Cong. Record, Nov. 15, 1919, vol. 58, p. 9053; Q. Wright, "Validity of the Proposed Reservations to the Peace Treaty," *Columbia Law Review*, 138 (February, 1920).

[2] Cong. Record, March 19, 1920, p. 4899.

especially where the international situation admittedly requires prompt and secret action.[1] But if used to excess it may properly be objected to as a virtual evasion of the Constitution and as tending toward personal and autocratic government.

RECESS APPOINTMENTS

Foreign relations should be carried on with as little interruption as possible through accidental or unforeseen changes in the personnel of the diplomatic force. Consequently, inasmuch as neither Congress nor the Senate is continuously in session, provision is made in the Constitution for the President to fill "vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session."[2] By virtue of this power the President has frequently made appointments to diplomatic positions by granting temporary commissions during the recess of the Senate. An ambassador or minister of the United States accredited to a foreign government may, for various reasons, vacate his office at any time. In such a case the President may appoint the secretary of embassy or legation as *chargé d'affaires ad interim,* and, if the Senate is not in session, grant him a temporary commission. The "full power" given by the President to a commissioner to negotiate a treaty is given

[1] Special diplomatic agents were employed to a notable extent during President Wilson's administrations. This was doubtless due in part to the unusually disturbed condition of international relations during this period. Several special Presidential agents were sent to Mexico during the time when it was the policy of our Government not to recognize the *de jure* character of the government of that country, and when, therefore, it would not have been feasible to send regular diplomatic officers. On May 12, 1917, the State Department announced the membership of a special diplomatic mission to Russia, including Mr. Elihu Root, bearing the title of ambassador extraordinary, and six ministers plenipotentiary, together with two ministers representing the army and navy. In this case, as in the other instances of special missions, there was no Congressional nor Senatorial authority, and the project was carried out on the authority of the President alone.

[2] Art. II, sect. 2, cl. 3.

specially in each particular case and may be conferred upon the resident minister as well as upon a special commissioner. If the President appoints an envoy to a foreign government with the particular object of negotiating a treaty, and sends his name to the Senate for confirmation, as President Washington did in 1794 when he appointed John Jay to negotiate a treaty with Great Britain, the Senate, in advising and consenting to the appointment, virtually gives its consent in advance to the opening of negotiations. If the Senate declines to confirm the appointment because it is opposed to the making of such a treaty, the President may, during the recess of the Senate, appoint an envoy for the purpose by granting him a temporary commission. Under the Constitution, this commission expires at the end of the next session. By that time, however, even though the Senate fails to confirm the appointment, the treaty negotiations may have been completed.

When President Madison, in 1813, appointed three commissioners to negotiate a treaty of peace with Great Britain, under the mediation of Russia, the Senate was not in session. Subsequently, the question was raised in that body as to whether the President had the power to make such appointments under the constitutional provision relating to the filling of vacancies that may happen during a recess. It was argued that no vacancy can happen in an office not previously full.[1] This narrow construction, however, has not prevailed. Attorney-General Wirt declared, in 1823, that the term, "may happen," is equivalent to "may happen to exist," and that without such interpretation, the constitutional provision could not be executed in its spirit, reason, and purpose.[2] Attorney-General Cushing declared in 1855 that this question was obsolete and that

[1] Resolutions of Senator Gore, March 7, 1814, Benton's *Abridgment of Debates*, V, 85.

[2] 1 Op. U. S. Atty.-Gen., 631. Cf. the opinion of Attorney-General Taney, 2 *ibid.*, 525. See also 12 *ibid.*, 32; 19 *ibid.*, 261.

there was no doubt that the President might appoint a diplomatic representative, during the recess of the Senate, "in a perfectly new case." [1]

[For References, see p. 96.]

[1] 7 Op. U. S. Atty.-Gen., 212.

CHAPTER V

DIPLOMATIC INTERCOURSE: PROCEDURE

OTHER aspects of diplomatic intercourse which require consideration are participation in international conferences and the removal of, instructions to, and reception of diplomatic representatives.

PARTICIPATION IN INTERNATIONAL CONFERENCES

On account of our traditional policy of avoiding foreign entanglements, and because of the absorption of our energies in the development of a comparatively new country, the United States has been somewhat wary about taking part in international conferences. The initiative in the calling of an international conference, or in arranging for the participation of the United States therein, has usually been taken by the President, though sometimes at the suggestion of Congress. In a special message to the Senate, December, 1825, President J. Q. Adams informed that body of an invitation which the United States had received to participate in a conference to be held at Panama the following year. He also informed the Senate that he had accepted this invitation, which act he deemed to be within his constitutional competence; but he added that he desired, before going further with the project, to secure the support of the Senate in advising and consenting to the appointment of envoys to the conference, as well as of Congress in passing the necessary appropriations.[1] The proposal aroused considerable opposition. The Senate committee

[1] Richardson, *Mess. and Pap. of the Presidents*, II, 318.

on foreign relations made a report opposing the project and declaring that the committee had been embarrassed by the fact, as stated in the President's message, that he had already accepted the invitation.[1] After much debate, however, the Senate finally confirmed the nominations of the envoys to the conference and Congress appropriated the necessary funds.[2]

Congress has sometimes undertaken to authorize the President to call an international conference, or to accept an invitation on behalf of our Government to participate in one. Thus by an act passed in 1888 Congress "authorized and requested" the President to invite the several American governments to join the United States in a general American conference to be held in Washington in 1889.[3] One section of the act undertook to outline specifically the purposes for which the conference should be called, and expressly provided that the President "shall set forth that the conference is called to consider" these purposes. Among the matters named were several on which Congress is constitutionally empowered to legislate, including the establishment of uniform customs regulations, a uniform system of weights and measures, and laws to protect patent rights and copyrights. In relation to these subjects the position of Congress was stronger than with regard to other matters not falling within its constitutional competence. In spite of the mandatory "shall," however, the President could not be legally compelled to call the conference, nor to limit its deliberations to the consideration of the matters specified by Congress.[4]

[1] Senate Exec. Jour., III, 474 ff.

[2] For a summary of the debate in the House on the proposition, see Hinds, *Precedents*, II, 1014-1018.

[3] U. S. Stat. at L., 50th Cong., 1st sess., p. 155. (Act of May 24, 1888.)

[4] This act became a law without the signature of President Cleveland, during whose administration it was passed. The presiding officer of the conference was James G. Blaine, secretary of state under President Harrison. To Blaine has often been attributed the merit of originating the Pan-American idea. Reinsch, *Public International Unions*, p. 78. For other instances of acts of Congress authorizing and requesting the President to call or participate in

The authority thus given by Congress to the President to call or participate in an international conference may be of practical importance in showing the support by the legislative branch of the policy involved. Should a conference be of such a character that participation in it by the United States might be regarded by another power as a ground for declaring war against us, Congressional approval of our participation in it would seem to be desirable.[1] Legally speaking, however, the President need not wait, even in this case, for specific authority from Congress. He might instruct our regular ambassador or minister to the country in which the conference is to be held to represent the United States at such meeting.[2] He might designate a special agent to attend the conference and provide for his compensation out of the contingent fund. In these ways the President, on his sole authority, could accept an invitation to participate in an international conference.[3] The President has, in fact, not infrequently accepted such invitations without waiting for any specific Congressional authority, and has appointed the American representatives without sending their names to the Senate. This was done, for example, in the case of the Hague Conferences of 1899 and 1907 and the Algeciras Conference in 1906.[4]

Acceptance by the President of invitations to participate in European conferences without authority from Congress or the Senate has been denounced as involving us in en-

international conferences, see 39 U. S. Stat. at L., 618; also acts of March 3, 1897, and February 20, 1907. See also U. S. For. Rels., 1878-9, p. 835.

[1] This was alleged in the case of our participation in the Panama Congress of 1826. Benton, *Abridgment of Debates in Congress*, VIII, 423 ff; IX, 107 ff.

[2] Thus, President Roosevelt appointed our ambassador to Italy, Mr. Henry White, to represent the United States at the international conference held at Rome to form the International Agricultural Institute. U. S. For. Rels., 1905, p. 560.

[3] This was admitted by Martin Van Buren in the debate in the Senate on the proposed American mission to the Panama Congress of 1826. Benton, *Abridgment*, VIII, 441.

[4] U. S. For. Rels., 1898, p. 543; *ibid.*, 1906, pt. 2, p. 1627. The United States participated in the Algeciras Conference as a signatory to the treaty of Madrid of 1880. Malloy, *Treaties*, etc., I, 1220.

tanglements by mere executive action.[1] The practice has aroused opposition especially when it was capable of being construed as committing the United States to the payment of expenses connected with the conference before Congress had given authority therefor. The question might be raised, therefore, whether Congress could constitutionally limit the discretion of the President in extending or accepting invitations to participate in international conferences. This, in fact, it has attempted to do. In the deficiency appropriation bill passed on March 4, 1913, a provision was inserted which declared that "hereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so."[2] By this stipulation Congress assumed to exercise the power of controlling the discretion of the President in this matter. If the provision were valid, he must secure in each particular case the prior specific authorization of Congress, and general authority implied from the existence of the contingent fund would not be sufficient.

Since the passage of the act of 1913, the President has generally, although not invariably, complied with its provisions. Thus, on September 10, 1919, President Wilson addressed a message to the Senate and House of Representatives in which, after reciting the provision of the act of 1913 quoted above, he transmitted a report of the Secretary of State relative to the proposed International Telegraphic Conference to be held in Washington in 1920, "for the consideration of Congress and for its determination whether it will authorize the extension of the invita-

[1] Thus, Senator Bacon declared: "The Executive may, without even sending any proposed treaty to the Senate, continue to send delegates to European international political conferences, and thus in time practically destroy our recognition of the long established doctrine of non-entanglement by us in such disputes. The sending of delegates from this Government to the Algeciras Conference is a case in point." "The Treaty-Making Power of the President and the Senate," *North American Review*, CLXXXII, 509 (Apr., 1906).

[2] 37 U. S. Stat. at L., 913.

tion, and the appropriation necessary to defray the expenses incident thereto."[1] In this message the President did not expressly request authority from Congress to extend the invitation, although such a request seemed to be implied. Even so, his action is not necessarily to be construed as a recognition of any legal power in Congress to control his discretion in this respect, but rather of the practical control of Congress in granting or withholding the necessary appropriations. To this extent, the act of 1913 represents an actual extension of Congressional authority, since, in most cases, participation in international conferences involves considerable expense.

In the act of 1913 no exception was made in the case of an international conference at which a treaty is to be negotiated. If the act were legally valid and enforceable it might, at times, operate as a serious check upon the power of the President to negotiate treaties. Yet by the practice, if not by the theory, of the Constitution, it has been almost uniformly recognized that the negotiation of a treaty is solely under the control of the President, subject only to the necessity of securing the advice and consent of the Senate to its ratification.[2] It seems clear that in negotiating a treaty through participation in an international conference, either in person or by his appointees, as in the cases of the Hague Conferences of 1899 and 1907 and the Paris Conference of 1919, the President is not bound to secure from Congress such specific authority as the act of 1913 purports to require. Again, could Congress limit the discretion of the President as commander-in-chief of the army and navy from entering, either in person or by his appointees, an international conference, during the course of a war, at which the terms of an armistice or capitulation

[1] House rept. 387, 66th Cong., 1st sess., pt. 1, p. 8. The President followed the same procedure with reference to the Sixth Annual International Sanitary Conference and the First Odontologic Latin-American Congress to be held at Montevideo in September, 1920. Cong. Record, May 15 and May 20, 1920, pp. 7694 and 7976.

[2] See below, Chap. VIII.

are to be drawn up and agreed upon? It seems clear that any attempt of Congress to do so would be in excess of its powers. Congress can constitutionally withhold funds which would enable the President to enter a conference at which the international good faith of the United States might be pledged, and may even withhold funds necessary to carry out such a pledge; but, on the other hand, it cannot limit by such an act as that of 1913 the constitutional powers of the President in the negotiation of treaties and in the discharge of his duties as commander-in-chief of the army and navy.

Even in the case of an international conference at which it is not proposed to negotiate a treaty, and which is unconnected with a war, any attempt by Congress to limit the President's discretion to participate, such as was made in the act of 1913, would be of doubtful constitutionality, since it would purport to limit the power of the President to treat with foreign governments which the Constitution impliedly confers upon him in granting him the right to send and receive ambassadors and other public ministers. If the President should see fit to disregard the limitation attempted to be imposed, it is difficult to see how Congress could control him in this respect, short of impeachment, except by declining to pass the necessary appropriations. This being true, it would seem that the same principle would apply to the case of a similar limitation attempted to be imposed upon the President through a Senate reservation to a treaty. Thus, one of the proposed Senate reservations to the Treaty of Versailles, as voted upon on November 19, 1919, prohibited any person from representing the United States under the Treaty or the League of Nations, or from performing any act for or on behalf of the United States thereunder, until such participation and appointment should have been provided for and the powers and duties of such representatives should have been defined by law.

This part of the reservation would seem to trench upon the power of the President, recognized in practice, of treating with foreign governments through special diplomatic agents without specific authority of law, although it would doubtless be within the constitutional competence of Congress to provide by law for the permanent representation of the United States in the regular organs of the League.[1]

INSTRUCTIONS TO DIPLOMATIC REPRESENTATIVES

The powers and duties of diplomatic and consular officers of the United States are derived from four sources: customary international law, treaties, acts of Congress, and executive regulations.[2] Such functions as may be conferred by customary international law are considered as falling in that part of the whole mass of powers and duties which is not covered by instructions derived from the other three sources. The functions of consuls are derived to a considerable extent from treaties, and this source of consular functions was recognized by an act of Congress of 1792 which provided that the specification by Congress of certain powers and duties of consuls was not to be "construed as implying the exclusion of others resulting from the nature of their appointments, or prescribed by any treaty or convention under which they may act."[3]

The convention of 1899 between the United States and Great Britain relating to the tenure and disposition of real and personal property provided for its own extension to the insular territories of the United States "only upon notice to that effect being given by the representative of the United States at London, by direction of the treaty-

[1] The proposed Senate reservation was modified as voted upon on March 19, 1920. Cong. Record, vol. 59, p. 4899. Cf. Q. Wright, "Validity of the Proposed Reservations to the Peace Treaty," *Columbia Law Rev.*, XX, 136-8 (February, 1920).

[2] 7 Op. U. S. Atty.-Gen., 249.

[3] 1 Stat. at L., 257; R. S., sect. 1714.

making power of the United States."[1] In this curious provision the attempt was made to subject a regular diplomatic representative of the United States, in a certain particular, to the direction of the President and Senate. Although the general powers and duties of diplomatic representatives might, to some extent, be regulated by international agreement, the employment of the treaty-making power as a means of giving specific instructions in particular cases seems hardly to be an appropriate method of procedure. The provision of the convention of 1899 is, moreover, open to objection as attempting to regulate by international agreement a matter which is properly one for purely domestic determination.[2]

The more usual methods of prescribing the powers and duties of diplomatic and consular officers are Congressional acts and executive regulations. By virtue of the coefficient or omnibus clause, together with the commerce clause, of the Constitution, Congress is endowed with authority to prescribe powers and duties for diplomatic and consular officers.[3] In the case of officers dealing with foreign relations, however, Congress has prescribed specific regulations only to a comparatively small extent. It has provided by act that no diplomatic or consular officer shall "correspond in regard to the public affairs of any foreign government with any private person, newspaper, or other periodical, or otherwise than with the proper officers of the United

[1] Malloy, *Treaties*, etc., I, 775. The last clause of this provision had originally read, "by direction of the President," but was changed by a Senate amendment.

[2] Although this treaty provided that the direction in question should come from the "treaty-making power," it might be construed to mean that the direction should come from the President and Senate acting jointly, but not through the making of a treaty, *i. e.*, not subject to securing the consent of any other power. This construction, however, does not materially diminish the objectionable character of the provision from the standpoint of constitutional practice.

[3] Cf. Kendall *v.* U. S. *ex rel.* Stokes, 12 Pet. 524; Shoemaker *v.* U. S., 147 U. S., 282. The powers and duties conferred by Congress should, however, be germane to the office, and not inconsistent with the Constitution. Cf. U. S. *v.* Ferreira, 13 How., 40.

States."[1] For the most part, however, Congress has left such matters to be dealt with by executive regulations. Thus, in organizing the Department of State, it provided, as we have seen, that, in the management of foreign affairs, the Secretary of the Department should "perform such duties as shall from time to time be enjoined on or intrusted to him by the President."[2] Congress, however, cannot limit its own discretion, and the provision quoted does not prevent it from itself imposing duties upon the Secretary of State. Thus by act of 1915 Congress directed the Secretary to keep an efficiency record of secretaries in the diplomatic service and of consular and departmental officers and employees.[3]

An act of Congress passed in 1856 authorizes the President "to prescribe such regulations, and make and issue such orders and instructions, not inconsistent with the Constitution or any law of the United States, in relation to the duties of all diplomatic and consular officers. . . . It shall be the duty of all such officers to conform to such regulations, orders, and instructions."[4] In the absence of such an act of Congress, however, the President, by virtue of his general executive power, might issue regulations and instructions and secure obedience to them through the exercise, or potential exercise, of his power of removal. In 1897 the State Department published a volume of instructions to the diplomatic officers of the United States. In addition, the published volumes of the "Foreign Relations of the United States" and the manuscript files of the State Department are full of instructions sent to our diplomatic representatives abroad.[5]

A distinction, however, must be made between the laying

[1] See R. S., sects. 1741, 1751.
[2] 1 Stat. at L., 28.
[3] 38 Stat. at L., 806.
[4] 11 Stat. at L., 60; R. S., sect. 1752.
[5] A volume of consular regulations was published in 1896, and the rules which it contained have since been added to from time to time. House doc. 303, 54th Cong., 2nd sess.

down of general rules prescribing the duties of all diplomatic officers, or of all those in a given class, and the giving of special instructions to diplomatic agents or to regular diplomatic officers with reference to particular matters which may come up in the course of their duties. The former function is one which is to some extent exercised by Congress and the Executive together; the Executive in this case merely reinforcing or supplementing the Congressional provisions or filling up gaps left by them. The latter function, however, is one which is not suitable for exercise by a legislative body, and it has been generally recognized as belonging to the Executive, although Congress has from time to time attempted to encroach upon this sphere of executive power.[1]

The special instructions given to regular diplomatic officers or to commissioners sent on special diplomatic missions, *e.g.*, to participate in an international conference or to negotiate a treaty, are formulated and signed by the President or the Secretary of State, and such officers and agents report to the authority from whom they receive their instructions.[2] The President may, on his own initiative or on request, transmit to Congress or to the Senate the special instructions which he proposes to give to particular

[1] Closely connected with the power of giving special instructions is the power of censuring diplomatic representatives for conduct while in office. In 1896 the House committee on foreign affairs recommended the passage of a resolution condemning and censuring Ambassador Bayard at London for utterances contained in speeches made by him in England. The minority report of the committee, however, signed, among others, by H. St. G. Tucker, condemned the proposed action of the committee as "unwarranted and unprecedented." "Representatives of the United States in foreign countries," it declared, "are properly and exclusively, as to the regulation of the propriety or discreetness of their conduct, under the direction and control of the executive department of the Government, and any interference by Congress in this respect can have only the effect of detracting from the dignity and usefulness of our foreign service." House rept., 520, 54th Cong., 1st sess., pt. 2. For copies of Bayard's speeches, see House doc. 152, 54th Cong., 1st sess.

[2] See "Report of the Delegates of the United States to the Third International Conference of the American States," 1906, p. 39, for their instructions, signed by the Secretary of State. In the case of the Second International Conference of American States, 1901, the instructions of our delegates were signed by the President (*ibid.*, pp. 45-49). For the instructions and report of the American delegates to the first and second Hague Conferences, see For. Rels. of U. S., 1899, pp. 511, 513; *ibid.*, 1907, pt. 2, pp. 1128, 1144.

diplomatic representatives. Thus, in 1792 President Washington submitted to the Senate for its approval the instructions in conformity with which he proposed that the commissioners appointed to negotiate a treaty with Spain should act. The instructions were approved by the Senate and were acted upon by the commissioners.[1] This action of the first President, however, was not considered a binding precedent either by himself or by subsequent Presidents. In the case of the mission of Jay to negotiate a treaty with Great Britain, President Washington failed to send his instructions to the Senate, and this gave rise to the introduction in that body of a resolution requesting him to do so. But the resolution was defeated.[2] Even if it had passed, it would admittedly have been a mere request, which the President need not have heeded. President Polk, in refusing the request embodied in a resolution of the House of Representatives that he communicate, if not inconsistent with the public interests, copies of instructions given to the commissioners appointed to conduct treaty negotiations with Mexico, said: "I avail myself of this occasion to observe that, as a general rule applicable to all our important negotiations with foreign powers, it could not fail to be prejudicial to the public interest to publish the instructions to our ministers until some time had elapsed after the conclusion of such negotiations." [3]

In 1798 the House of Representatives considered a resolution requesting the President to communicate to it the instructions to and dispatches from the envoys extraordinary to France, known as the "X Y Z" mission.[4] A pro-

[1] Senate Exec. Jour., I, 106, 115; Crandall, *Treaties: Their Making and Enforcement*, 69.

[2] Exec. Jour., I, 151; Crandall, *op. cit.*, 70.

[3] Richardson, *Messages and Papers of the Presidents*, IV, 602; Hinds, *Precedents*, II, 988. President Polk had previously declined fully to comply with an unconditional request of the House of Representatives, contained in a resolution of January 4, 1848, for a copy of the instructions issued to our minister to Mexico. Richardson, *op. cit.*, IV, 565-7; Hinds, *Precedents*, II, 986-7.

[4] Annals of Cong., 5th Cong., cols. 1370, 1371.

posed amendment to add the words: "or such parts thereof as considerations of public safety and interest, in his opinion, may permit" was defeated. In the debate several members expressed doubt as to the propriety and constitutionality of the call as far as it related to instructions given to our ministers.[1] The resolution was nevertheless passed by a vote of more than two to one, and the instructions, with slight reservations, were transmitted to the House by the President.[2] Again, during the Senate's consideration of the treaty of peace with Spain a resolution was passed, in 1899, requesting the President, so far as in his judgment was not inconsistent with the public interest, to communicate to the Senate all instructions given by him to the commissioners who negotiated the treaty. President McKinley complied with this request by transmitting the original instructions.[3] In neither of these cases, however, was the President legally bound to respond. He did so only through practical considerations of policy and expediency, or through a desire to act in a spirit of comity with the legislative branch.

Congressional requests for diplomatic instructions after they have been given and acted upon is a less serious interference with executive power than an attempt by Congress, or either branch thereof, to dictate to the President or to participate with him in the giving of such instructions, or to give them directly. In connection with the request of President J. Q. Adams that Congress appropriate the necessary funds to enable him to send ministers to the Panama Congress of 1826, the House of Representatives considered a proposition expressing the sense of that body as to what the ministers ought and ought not to do. In defense of this proposition it was argued that the power of the House to appropriate for the expenses of the mission carried with it

[1] See remarks of Mr. Bayard, Annals of Cong., 5th Cong., col. 1359, and of Mr. Hartley, *ibid.*, col. 1369.
[2] Richardson, *op. cit.*, I, 265.
[3] Senate doc. 148, 56th Cong., 2nd sess., pp. 3-8.

the right to impose conditions. Opposition, however, was led by Daniel Webster, who argued that the House had no right to decide what should be discussed by particular ministers, and that, if such instructions might be given by the House in this case, they might be given in all cases, thus usurping the prerogative of the Executive.[1] It was also pointed out, in the course of debate, that the House proposition was an attempted infringement upon the treaty-making power. Attention was called, too, to the confusion which would result if the House and Senate separately undertook to give instructions which turned out to be incompatible. The proposition was eventually defeated.[2]

In this matter, as in other phases of our foreign relations, the power of Congress to appropriate necessary funds for foreign missions may indirectly operate to give some practical influence over the determination of the instructions of our commissioners, and any expression of opinion by Congress is entitled to weight and due respect, as that of representatives of the people from whom all authority is ultimately derived. This is especially true of the Senate when the commissioners are appointed to negotiate a treaty which must subsequently be submitted to that body for approval. The President, however, is recognized as having control over the negotiation of treaties, and may appoint for their negotiation special agents who act solely under his direction. Neither Congress nor either branch thereof

[1] Benton, *Abridgment of Debates*, IX, 94-95. Webster also declared that the appropriation power of the House did not enable it to give any gifts of its own, since it was rather the steward over a trust fund.

[2] Benton, *Abridgment*, IX, 217. The proposition carried, however, in committee of the whole by a vote of 99 to 95 *(ibid.)*. For summary of the debate, see Hinds, *Precedents*, II, 1015-1018. In 1912 the House committee on foreign affairs reported favorably a joint resolution authorizing the President to instruct the delegates of the United States to the next Hague Conference and to the next Pan-American Conference to express the desire of the United States that the nations represented should guarantee their territorial boundaries and not seek to increase the same by conquest. House rept. 705, 62nd Cong., 2nd sess. In the previous year this committee reported favorably a joint resolution to instruct the delegates of the United States to the Third Hague Conference. House rept. 2216, 61st Cong., 3rd sess. Neither of these resolutions, however, was adopted.

can legally control the President's discretion in instructing these agents. The President exercises not only legal control but predominating practical influence, both through his power to negotiate treaties and through his power to appoint and remove diplomatic officers and agents.[1]

RECEPTION OF DIPLOMATIC ENVOYS

As indicated above, the Constitution vests the power of receiving "ambassadors and other public ministers" in the President. This phrase, as Attorney-General Cushing pointed out, embraces "all possible diplomatic agents which any foreign power may accredit to the United States."[2] Although consuls are not mentioned by the Constitution in this connection, it is established in practice that they must be recognized by exequatur of the President before entering upon their duties. Moreover, this power of the President with regard to all classes of foreign diplomatic and consular agents is exclusive; for the President, as we have seen, is the sole organ of communication with foreign states.[3] It was apparently expected by the framers of the Constitution that this function would be purely ceremonial. In reality, however, as will be shown, it has become an im-

[1] Cf. the remarks of Senator Spooner, already quoted: "He [the President] may issue to the agent chosen by him—and neither Congress nor the Senate has any concern as to whom he chooses—such instructions as seem to him wise. He may vary them from day to day. That is his concern. The Senate has no right to demand that he shall unfold to the world or to it, even in executive session, his instructions or the prospect or progress of the negotiation." *Supra,* p. 71 n. In this connection it may be mentioned that President McKinley changed by cable the original instructions of the United States commissioners at the Paris peace conference of 1898.

[2] 7 Op. U. S. Atty.-Gen., 209.

[3] See note of Secretary J. Q. Adams in 1818 in which, with reference to a communication from the Swedish Government addressed to the "President and Senate of the United States," he took occasion to point out that all ceremonial communications from foreign governments should be addressed to the President alone, and declared that "the authority to receive foreign ministers is vested exclusively in the President." Moore's *Digest of Internat. Law,* IV, 462. This did not mean, however, that ordinary communications might not be addressed to the Secretary of State.

portant factor in enabling the President to exercise the power of recognizing foreign governments.

TERMINATION OF DIPLOMATIC MISSIONS

About a dozen different ways in which diplomatic missions may terminate are usually enumerated in works on international law.[1] The most important are the recall and the dismissal. The recall is used by our Government in the case of our own diplomatic officers accredited to a foreign government, while dismissal is applied to a representative of a foreign government accredited to us. A recall may be brought about on the initiative of our Government, or it may be brought about at the request of the foreign government to which the diplomat is accredited. Changes in the diplomatic service of the United States usually take place concurrently with a change of administration at Washington, even though there has been no change of party control in Congress. When a new administration comes in, our diplomatic representatives abroad customarily submit their resignations to the President. The power of the President to recall diplomatic representatives is merely one phase of his general power, now well-established, of removing all officers of government who are appointed by him, whether alone or with the advice and consent of the Senate.[2] According to the Printed Instructions issued by the State Department, "A recall is usually accomplished at the pleasure of the President, during a session of the Senate, by sending to that body the nomination of the officer's successor. Upon the confirmation and commission of his successor, the original incumbent's office ceases."[3] The

[1] See, *e.g.*, Oppenheim, *International Law*, I, 476 ff.; Foster, *Practice of Diplomacy*, Chap. IX.

[2] Parsons *v.* United States, 167 U. S., 324. Congress, however, may regulate removals in the case of inferior officers whose appointment it has vested in heads of departments. United States *v.* Perkins, 116 U. S., 483.

[3] "Instructions to Diplomatic Officers of the United States," quoted in Moore, *Digest of Internat. Law*, IV, 470.

President, however, may recall a diplomatic officer without appointing a successor, and thus allow the post to remain vacant.

The question may be raised whether Congress, as well as the President, has not power to remove diplomatic representatives from office. This it undoubtedly has, through the process of impeachment. This method of removal, however, is so cumbersome as to be, for practical purposes, almost entirely ineffective as a means of control. In 1855 Congress passed an act requiring consuls to account for the fees collected by them, "under penalty of being removed from office." Attorney-General Cushing held this penal clause to be inexecutable and of dubious legality. "Does the act," he asked, "mean to dictate to the President when to remove a public officer? That cannot be. The power of removal, and the absolute right to exercise it according to his conscience, like the power of appointment, he holds by the Constitution."[1]

Foreign diplomatic representatives accredited to our Government cannot be reached by Congress, even by impeachment, and their right to continue to act is dependent upon the pleasure of the President. The right of the President to dismiss the representatives of foreign nations at our capital may be implied, not only from his general control of foreign affairs, but also from the power granted him by the Constitution to receive ambassadors and other public ministers. This is a power which, it is recognized, should be exercised by the President only under great provocation, since a request directed to the foreign government to recall the obnoxious minister is usually equally effective. Nevertheless it has been exercised by the President on several occasions, one of the most famous being that on which Lord Sackville-West, the British minister, having been guilty of an indiscretion, was handed his passports in

[1] 7 Op. Atty.-Gen., 251.

1888, by Secretary Bayard.[1] In 1917 Count Bernstorff, the German ambassador, being implicated in plots against our peace and safety, was handed his passports by the Secretary of State, by direction of the President.[2]

The power of severing diplomatic relations with a foreign government, whether through recall or dismissal, is of great importance. Its use is likely to make more difficult the maintenance of friendly relations between the two countries in question, and may be the preliminary step to war. But, although the exercise of the power involves grave responsibility, it rests with the President alone. In February, 1917, President Wilson severed diplomatic relations with Germany on his own responsibility and without consulting Congress, merely announcing to that body the fact that he had done so.[3] Two months later Congress declared war.

THE COURTS AND DIPLOMATIC ENVOYS

Under the Constitution, the Supreme Court has original jurisdiction in all cases affecting ambassadors and other public ministers and consuls. Foreign ambassadors and ministers are entitled to extensive diplomatic immunities, and on that account are not subject to suit or prosecution in our courts, although they may bring such suits therein against private citizens. Whether a person claiming to be a foreign diplomatic envoy is really such, is for the President to decide. His recognition as an envoy by the President is conclusive upon the judiciary.[4]

[1] The President may also dismiss consuls by revoking their exequaturs. For examples of presidential proclamations revoking exequaturs of foreign consuls, see Richardson, *Mess. and Pap. of the Presidents,* VI, 219, 511, 512. Cf. Coppell *v.* Hall, 7 Wall., 542, 553; Moore's *Digest of Internat. Law,* V, 19 ff.

[2] In 1915 our Government requested and secured the recall of Dr. Dumba, the Austro-Hungarian ambassador.

[3] Address at joint session of Congress, Feb. 3, 1917. On April 19, 1916, however, the President had appeared before Congress and informed it of his warning to Germany that unless she immediately abandoned her methods of submarine warfare our Government would be forced to sever diplomatic relations with her altogether.

[4] *In re* Baiz, 135 U. S., 403; United States *v.* Ortega, Fed. Cas. No. 15,971 (1825).

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CHAPTER VI

THE CONSULAR SERVICE

WHEN the United States became an independent nation it inherited the principles governing the diplomatic and consular systems then existing in the Old World. The rights and privileges of our consuls abroad are therefore derived in part from international usage. Their position is also regulated by treaties and by statutes and ordinances of our domestic authorities. They are stationed in important political and commercial places throughout the world; and, unlike the members of the diplomatic service, they have dealings mainly with the local authorities rather than with the central governments.

HISTORICAL DEVELOPMENT

At first, the United States had no consular service separate from the diplomatic service; the same officers performed both diplomatic and consular functions, reproducing, in this respect, the history of the consular systems of Europe. This lack of differentiation between the two services produced inconveniences, even at a time when our foreign commerce was comparatively small, and as the importance of our foreign relations increased, it became more obvious that a separate consular service would have to be established, in order that special attention might be paid to consular functions, as well as to relieve officers whose duties were primarily diplomatic from the distractions of consular responsibilities.

The framers of the Constitution expressly recognized in

that instrument the distinct status of consuls. It was provided that consuls should be appointed by the President, by and with the advice and consent of the Senate. It was also stipulated that the judicial power of the United States should extend to all cases affecting consuls. The Supreme Court was given original, but not exclusive, jurisdiction in such cases; hence suits against foreign consuls may be brought in the lower Federal courts. These provisions have the effect of excluding the state courts from jurisdiction in cases affecting consuls, unless these officials voluntarily bring suits in such courts.

The first act of Congress relating to the consular service after the adoption of the Constitution was delayed until 1792. Meanwhile, however, President Washington, recognizing the need of creating an independent consular service, appointed some sixteen consular officers under his constitutional authority and without waiting for any special Congressional authorization. Inasmuch as these officers received no compensation out of the treasury of the United States, it was not necessary for Congress to make an appropriation for this purpose. The provisions of the act of 1792 indicated that, in the mind of Congress, the object of the consular service at that time was not so much to promote and extend American commerce as to afford protection to American merchants and sailors and to administer the estates of American citizens dying abroad without legal representatives on the spot. Both the provisions and the omissions of the act of 1792 give evidence of the crudity and undeveloped condition of the consular service at that time. Thus, no qualifications were required for entrance into the service. Foreigners might be employed, and this was sometimes done in places where it was impracticable to induce Americans to accept appointment. Consuls might, and not infrequently did, engage in trade of a private nature, so that they did not give their undivided attention to their public duties. Except in the Barbary states, con-

suls received no salaries, but derived their compensation from fees, whose amount varied considerably from place to place, according to the volume of business transacted. No accurate account of these fees was kept at Washington.

In 1833 Secretary Livingston, after investigation, made a report recommending that the service should be reformed by prohibiting consuls from engaging in private business, by substituting salaries for the fee system, and by establishing a more precise definition of consular powers and duties. Congress, however, failed to adopt these suggestions until many years later. After passing, in 1855, an abortive act, some of whose provisions were, in the opinion of Attorney-General Cushing, unconstitutional, Congress enacted in the following year an important law carrying out to some extent Livingston's recommendations. This measure more exactly defined certain of the powers and duties of consuls, and the President was given authority to supplement the law in this respect by issuing regulations having the force of law. Consulates were divided into three classes, in the order of their importance. Consuls in the first class were put upon a salary basis and were prohibited from engaging in private trade. Those in the second class also received salaries, but might engage in trade. The third class remained on the fee basis, and an attempt was made to secure from members of this class an accounting of the amount of fees collected; but no adequate means were inserted in the act for the enforcement of this provision. Non-trading consuls were given an extra allowance of ten per cent. of their respective salaries for office rent, which was afterwards increased to twenty per cent. But even the larger amount proved inadequate.

Another interesting feature of the law of 1856 was the authority granted the President to appoint a number of consular "pupils," or clerks, at a salary of $1,000; though Congress failed to make an appropriation for them until

1864.[1] They were to enjoy comparatively secure tenure, and it was intended that, when they had received training in these subordinate positions, they would be promoted to the higher ranks. The provision has not been successful in accomplishing this object, but it marks the first attempt by law to put any branch of the consular service on a permanent basis, protected from the raids of spoils politicians to which the service had been subject. A further extension of this idea was made by President Cleveland through an executive order of 1895 providing that vacancies in the lower grades of consuls should be filled either by transfer from the Department of State or by appointment from among persons who had been designated by the President and had passed an examination set by a board of three persons appointed by the secretary of state. The greatest step in this direction, however, was taken in an executive order of President Roosevelt, issued in 1906, which followed an act of Congress of the same year reorganizing the service. These important measures toward a more permanent consular service were taken as the result, in part, of a more general appreciation of the value and importance of the consular service, especially in connection with the promotion of commerce. Since the Spanish War the functions of consuls in this respect have become far more important than before, on account of our increasing influence and responsibilities abroad, our more numerous contacts with other nations, and the great expansion of our international trade.

GRADES OF CONSULAR OFFICERS

At first, there was little or no official gradation in the consular service, but gradually distinctions of rank have developed. Although the term consul may be used ge-

[1] The salaries of consular clerks, or assistants, as they are now called, were raised by act of 1918 to $1,500 for the first year and up to $2,000 for the fourth year of continuous service.

nerically to embrace all consular officers, it is also used as the designation of one of the particular grades. The various grades of consuls may be divided into three groups: principal, subordinate, and special. The principal consular officers are consuls and consuls-general. The latter grade was created because it was found that, in certain Oriental countries, a mere consul was at a disadvantage in obtaining interviews and concessions. Consuls-general of the United States, however, are now found in most of the principal countries, and they exercise a limited supervision over the consuls in the respective countries in which they are stationed. In a few instances they also have functions of a diplomatic nature. Otherwise, their powers and duties are practically the same as those of consuls. The President is authorized by law to define the extent of territory to be embraced within any consular district, and this usually includes all places nearer to a particular consul than to any other.

A special grade of consular officer is that of consul-general at large, or inspector of consulates, which was created by the act of 1906. Seven of these officers are now provided for. They are appointed only from members of the consular force having the requisite qualifications of experience and ability.[1] Their duty consists in visiting and inspecting each consulate and consulate-general at least once every two years; and if they find that any of these offices are not properly conducted, they may be authorized by the President to suspend the principal officer and to administer the office for a period of ninety days. During such period they may also suspend, for proper cause, any subordinate officers or clerks attached to such office. In the group of special consular officers may also be mentioned consuls who are assigned to serve as assistants to consuls-general in economic investigational work.

[1] Consuls-general at large receive the inadequate salary of $5,000 and traveling and subsistence expenses.

Subordinate consular officers and grades include vice-consuls, consular assistants or clerks, and consular agents.[1] In certain Oriental countries there are also interpreters and marshals. Vice-consuls perform consular duties subordinate to consuls and consuls-general within the limits of the consulate, and may also act as substitute officers when the principal consular officers are temporarily absent from their posts. The same person sometimes acts both as vice-consul and as consular assistant. There are two grades of vice-consuls: those *de carrière* and those not of career. The former are appointed by promotion from the lower ranks or grades, or from candidates who have passed an examination, while the latter are appointed without examination. Vice-consuls not of career, however, may not be promoted to the grade of vice-consul *de carrière* without undergoing the usual examination. Consular agents are officers subordinate to a consul or consul-general. They exercise limited consular functions at places different from those at which their principals are located. They are permitted to engage in private business, and are usually local merchants. They are allowed compensation of not more than $1,000 a year, which is paid from one-half of the fees they collect. Consular officers are required to account to the Department of State for all fees received. All grades of consular officers, with the exception of consular agents, are paid a salary fixed by law, and fees which come to them must be turned into the treasury of the United States. All persons in the consular service receiving a salary of $1,000 or more are required by law to be American citizens, and are prohibited from engaging in private trade.

Supervision and direction over the consular service is maintained by the Department of State, in which, as we have seen, a consular bureau has been created. Instructions and regulations are issued from time to time to con-

[1] The offices of vice-consul-general, deputy-consul-general, and deputy-consul and the grade of commercial agent have now been abolished.

sular officers. The consuls-general at large, when traveling on inspection trips, act under the instructions of the Secretary of State. Careful watch is maintained in Washington over the manner in which the various consular officers handle their official business, and a detailed efficiency record of the work of each of them is kept in the Department.

APPOINTMENT, PROMOTION, AND REMOVAL

As already noted, the Constitution provides that the President shall nominate, and by and with the advice and consent of the Senate, shall appoint consuls, but also that Congress may by law vest the appointment of inferior officers in the President alone or in the heads of departments. Consuls, consuls-general, and consuls-general at large are appointed by the President and Senate. Vice-consuls and consular agents are appointed by the Secretary of State, usually upon the nomination of the principal consular officer. The President, acting alone, is authorized by law to appoint consular assistants or clerks. Formerly all appointments were to particular posts; transfers were not permissible; and if a consul was forced by war or unsettled conditions to abandon his post, his salary ceased. As a result of conditions which arose in important commercial centers during the early stages of the World War, the disadvantages of this inflexibility of the service were accentuated and, in order to relieve the situation, Congress passed, in 1915, a law prescribing that consuls and consuls-general shall be appointed to grades and not to posts. It was also provided that transfers might be made from post to post within the grade by executive order. The consent of the Senate is not required except for promotions and new appointments. The operation of this law has resulted in greater mobility and elasticity in the service, enabling the State Department better to adjust the personnel of the serv-

ice to changing conditions, notably in Europe and in Mexico.

The act of Congress passed in 1906 for the reorganization of the service divided the grades of consul and consul-general into a number of classes according to salary. The act was defective, however, in that it failed to make any provision for the merit system in appointments. Accordingly, President Roosevelt, in the same year, acting by virtue of the law of 1883 authorizing the Chief Executive to cover civil servants of the United States into the classified service, issued an executive order which, as amended and supplemented by later act, regulations, and executive orders, provides in substance that vacancies in the offices of consul-general and the higher classes of consuls shall be filled by promotion on the basis of efficiency from the lower grades of the consular service or by transfer from the Department of State. Vacancies in the two lowest classes of consuls are to be filled either by promotion on the basis of ability and efficiency from the ranks of vice-consuls, consular assistants, and interpreters, or by new appointment of candidates who have satisfactorily passed examinations.

Candidates for new appointment in the service must be between twenty-one and fifty years of age and citizens of the United States, and they must be specially designated by the President for appointment subject to examination. The board of examiners consists of the director of the consular service, the chief of the consular bureau, an officer of the Department of State designated by the President, and an examining officer from the United States Civil Service Commission. The board is thus composed of two elements: first, officials of the department in which the consuls appointed are to serve, and, secondly, an official of the general civil service examining body. This arrangement is designed to overcome the lack of understanding and coöperation which sometimes arises between the Civil

Service Commission and the departments to which members of the classified service are attached. The examination consists of two parts, oral and written, the two counting equally. The oral examination is designed to ascertain the candidate's alertness, address, and personality. The written examination is designed to test his knowledge of such subjects as modern foreign language, geography, the resources and commerce of the United States, political economy, international, commercial, and maritime law, modern history, and American history, government and institutions. Candidates for appointment in countries in which the United States exercises extraterritorial jurisdiction are also examined in the fundamental principles of the common law, the rules of evidence, and the trial of civil and criminal cases. Candidates who attain, on the whole examination, an average mark of at least 80 are certified by the board as eligible for appointment and remain on the eligible list for two years unless sooner appointed.

Both in designations by the President and in appointments after examination, regard is had for the rule that, as between candidates of equal merit, appointments shall be so made as to secure proportional representation of all the states. Absolute geographical representation is, of course, not practicable. Even so far as it is practicable, it is a handicap to the working of the merit principle. The rule has been called one of the penalties which had to be paid in order to get the system established.[1] The executive order of 1906 declares that "neither in the designation for examination or certification or appointment will the political affiliations of the candidate be considered." Inasmuch, however, as it is necessary that presidential nominations to consulships be confirmed by the Senate, there is at least a possibility that political considerations will be involved in the appointments through the operation of the rule of

[1] W. J. Carr (director of the consular service), in *Conference on Training for Foreign Service*, 24.

"Senatorial courtesy." This is borne out by the statement of the director of the consular service that it is customary to ask a candidate to place on file with the Department a letter from the Senators of his state, recommending or consenting to his appointment.[1]

The merit system of appointment to the consular service as thus outlined has not yet been applied to its full extent. It applies only to the lowest grades of consuls. In the main, it rests merely on executive orders, which may be changed by the President at any time. Moreover, it does not apply to removals from the service, which may still be made for political reasons. In spite of these deficiencies, however, there can be no denying that, within the past decade or two, the tone and character of our consular service have considerably improved. It has been urged that a still greater improvement could be secured if the Government would establish a special institution for training men for the service. But, as the director of the service has pointed out, the small number of men who can hope to gain admission seems to make the establishment of such an institution impracticable.[2]

POWERS AND DUTIES

A newly appointed consul proceeds to Washington, where he receives his instructions and executes the required bond. He then goes on to his post. Before entering upon the discharge of his duties, however, he must obtain his exequatur, which is the official recognition by the foreign government of his status as consul. Its bestowal constitutes formal permission by that government for him to perform his official duties. The request for the exequatur is made upon the minister of foreign affairs of the foreign government by the principal diplomatic officer of the United States in the country concerned. The foreign government has a right

[1] *Conference on Training for Foreign Service*, 20.
[2] *Ibid.*, 25.

to refuse the request, although this is not often done, and may also revoke the exequatur at any time, which action is equivalent to a dismissal of the consul. It is not required that any reason be assigned for refusing or revoking an exequatur, although considerations of international comity dictate that the grounds of such action shall, as a rule, be stated.

The duties of consuls are stipulated partly in acts of Congress and partly in orders and regulations prescribed by the President and issued by the Department of State. By act of 1856 Congress assumed to authorize the President "to prescribe such regulations and to make and issue such orders and instructions, not inconsistent with the Constitution or any law of the United States, in relation to the duties of all diplomatic and consular officers . . . from time to time as he may think conducive to the public interest."[1] The acts of Congress and executive regulations are supplemented by the provisions of special treaties and the general usages of international law. At first only occasional circular instructions were issued by the State Department. In 1883 a short code of instructions was drawn up by Secretary Livingston. These have been added to from time to time, and in 1896 a comprehensive compilation of regulations was issued.[2]

Upon taking charge of his office the consul notifies the Department at Washington and likewise the principal diplomatic officer of the United States in the country where he is located. He also familiarizes himself with local regulations, and with the treaties between the two countries. His duties may be broadly classified as negative and positive. Negatively, it is his duty not to express publicly his opinion on local political questions and not to accept gifts, offices, or titles from the foreign government except with the special consent of Congress. His positive duties are more

[1] 11 Stat. at L., 60.
[2] House doc. No. 303, 54th Cong., 2nd sess.

numerous and varied. They may be divided into two main classes: (1) those relating to the promotion of American trade and commerce, and (2) those pertaining to the protection of the interests of the American Government and of American citizens.

The activities of the consul in connection with the promotion of trade consist largely in the collection and reporting of information concerning commercial conditions and opportunities abroad. He supplies this information in part by answering inquiries addressed to him by American exporters and business houses, but more generally by sending reports to the Department at Washington regarding the possibilities of foreign markets for American products. Prior to 1880 consular reports were collected and published in an annual volume. This publication was, however, of comparatively little practical use, because the information was often largely out of date before it became generally available. Beginning in 1880 monthly reports were issued, and in 1898 a series of daily reports was started. Since some of the matter sent in by consuls does not bear directly on commerce, or is not in the most usable form, a considerable amount of editing of the reports is done by the consular bureau in the State Department before they are issued to the public.

The principal subjects upon which information is supplied by the consular reports are the special demands of local markets due to prevailing customs or prejudices, or to unusual shortage of crops; changes in foreign laws bearing on commerce, such as customs regulations, patent laws, and food laws; and foreign methods of doing business. Information which the reports supply upon these topics is frequently of much value to American business men. It will doubtless become still more useful as the members of the consular service gain in expertness and as business men themselves learn how to coöperate with the consuls more effectively.

The second main class of positive duties of consuls consists in the protection of the interests of the American government and of American citizens. These duties may be subdivided according as they relate to (1) the enforcement of the customs regulations, (2) immigration and quarantine, (3) shipping and seamen, and (4) American citizens other than seamen. Closely connected with the promotion of trade is the work of consuls in detecting and preventing violations of the customs revenue laws of the United States through the efforts of foreign producers to undervalue their goods or of individuals to smuggle valuable articles into this country. Consuls are required to certify to the correctness of the valuation of merchandise shipped from foreign countries to the United States, and, in order to do so intelligently, must investigate the costs of manufacture abroad.

Consuls are required to aid in the enforcement of the immigration laws of the United States, especially with reference to the exclusion of certain prohibited classes of immigrants, such as contract and Chinese laborers, criminals, paupers, and persons suffering from contagious disease. Before a vessel sails from a foreign port for the United States the master is required to submit to the American consul a list and description of the immigrants on board, and the consul must satisfy himself of its accuracy. This record is later to be submitted to the immigration inspector at the port of arrival. The consul also inspects the sanitary and health conditions of the vessel, crew, passengers and cargo; or he employs inspectors for this purpose. If such conditions are found satisfactory, he issues to the vessel a bill of health.

In addition to certifying to the bill of health the consul is also required to inspect and satisfy himself as to the correctness of the other papers of the ship, such as the charter-party, crew list, and certificate of registry. In case an American vessel is wrecked or stranded, it is the duty

of the nearest consul to render such assistance as may be possible, by taking action for the preservation of the ship and cargo and relieving the distress of passengers and crew. He is authorized to send shipwrecked American seamen back to the United States. Seamen as a class are, indeed, under the special protection of the consul, on account of their liability to be imposed upon. The consul supervises the engaging and discharge of seamen in a foreign port, and sees that they understand the terms of their contracts and that their wages are duly paid. He undertakes to settle disputes which may arise between master and seamen, investigates charges of mutiny upon the high seas, and may send mutineers back to the United States for trial.

In regard to American citizens other than seamen, consuls "are expected to endeavor to maintain and promote all the rightful interests of American citizens and to protect them in all privileges provided for by treaty or conceded by usage; to visé, and, when so authorized, to issue passports; when permitted by treaty, law, or usage, to take charge of and settle the personal estate of Americans who may die abroad without legal or other representatives, and remit the proceeds to the Treasury in case they are not called for by a legal representative within one year." [1]

EXTRATERRITORIALITY

In addition to the foregoing duties, our consuls are invested with certain judicial powers in a few countries whose methods of administering justice are considered distinctly below the standard commonly prevailing in civilized states. In such countries, including China, Turkey, Siam, and Morocco, the United States exercises the right of extraterritoriality, whereby consuls have power to try civil cases to which Americans are parties, and, in some instances,

[1] *American Consular Service*, 5-6.

also to try criminal cases. Inasmuch as the rights of American consuls in this respect rest upon treaties, consular conventions, or "capitulations" with the particular countries, they vary from one country to another according to local conditions. Indeed, in the case of Turkey, there has been a long outstanding difference of opinion between the two governments as to the validity and interpretation of the capitulations. In general, however, it may be said that the American consul in these countries has a right to hear and determine all disputes of a justicable nature between American citizens and all in which an American citizen is defendant.

In 1860 Congress passed an act providing that the jurisdiction of consuls, in both civil and criminal cases, should be exercised in conformity with the statutes of the United States in so far as they should be found suitable. In so far as the statutes were not suitable, the common law and the law of equity and admiralty were to be applied; and if none of these furnished appropriate remedies, the principal diplomatic officer of the United States should supply such deficiencies by issuing regulations having the force of law.[1] Inasmuch as the common law differs in different states, there was at first some doubt as to the meaning of this provision. The circuit court of appeals, however, held that what was intended was the common law in force in the several American colonies at the date of separation from Great Britain.[2]

There was also at first some doubt as to whether the Anglo-Saxon principle of trial by jury, as provided for in the Constitution, was applicable to cases tried in consular courts. In 1880 an American seaman named Ross committed murder on board an American vessel in the harbor of Yokohama, Japan, in which country the United States at that time exercised extraterritorial jurisdiction. The

[1] 12 Stat. at L., 73; R. S., sect. 4086.
[2] Biddle *v.* United States, 156 Fed., 762.

offender was convicted in a trial before the American consular court, without either a grand or petit jury. Ten years later, while serving a life sentence in the United States, he applied for a writ of habeas corpus on the ground that his conviction without trial by jury was unconstitutional. The Supreme Court held, however, that the Constitution of the United States can have no operation in another country and that Congress, therefore, in regulating the procedure in consular courts, is not limited by the bill of rights of the Constitution. As a further reason for its opinion, the court pointed out that it would ordinarily be impracticable to operate the jury system in such courts, on account of the difficulty of obtaining a competent grand or petit jury.[1]

In 1906 Congress passed an act providing for the establishment of the United States Court for China, to exercise appellate jurisdiction in such cases as might be tried in that country by the consular courts. The court was to have a special judge, appointed by the President with the consent of the Senate; and the headquarters were to be at Shanghai, although sessions might be held at other places. The former consular courts, however, were not entirely superseded; they may still hear minor civil and criminal cases, subject to appeal to the court at Shanghai. It was also provided that appeals should lie from the final judgments and decrees of this tribunal to the circuit court of appeals at San Francisco, and thence to the Supreme Court of the United States.[2]

PRIVILEGES AND IMMUNITIES

Consuls, not being public diplomatic ministers, are not entitled to the privileges and immunities accorded to dip-

[1] *In re* Ross, 140 U. S., 453. Cf. Dainese *v.* Hale, 91 U. S., 13.

[2] On the United States Court for China, see Hearings before the Committee on Foreign Affairs of the U. S. House of Representatives on the bill (H. R. 4281) relating to the United States Court for China, 1917; C. S. Lobingier (judge of the U. S. court for China), "The Judicial Superintendent in China," *Illinois Law Review,* XII, 403-408 (Jan., 1918); W. R. Austin,

lomatic envoys, and, except in the undeveloped countries mentioned above, the principle of extraterritoriality does not apply to them. They are accorded certain privileges and immunities, however, by the general rules of international law, and these have been modified in particular cases by consular treaties and conventions with the respective countries. Such treaties usually provide that a consul may display the national flag and arms at the consulate, and that his dwelling and the archives of the consulate shall be inviolate. Consuls are exempt from compulsory process to testify in court when such service would interfere with their official duties.[1] Unless a citizen of the country in which he is stationed, a consul is also exempt from service on juries and in the military forces.

Consuls are not subject to taxation on their salaries or official business, but they are liable for private debts and may be taxed on any private business in which they are engaged or on any income which they derive from private sources. In the absence of treaty stipulation, they are subject to arrest, trial, and conviction for violation of the criminal laws of the country in which they are stationed. This method of procedure would be justified in extreme cases, *e.g.*, plotting against the government. In ordinary cases, however, the mere revocation of the exequatur will suffice and is preferable.[2]

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[1] *In re* Dillon, 7 Fed. Cas. 710; Moore, *Digest of Internat. Law*, V, 78 ff.
[2] 7 Op. U. S. Atty.-Gen., 367, cited in Moore, *ibid.*, V, 70.

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CHAPTER VII

THE POWER OF RECOGNITION

UNDER the rules of international law, various situations may arise which give occasion for the exercise by a state of the power of recognition. A state which was formerly one may, on its own volition, break apart and form two or more states by a peaceful revolution; or, on the other hand, several separate states may merge into a single state. An insurrection may break out in a state, and a colony or dependency, or some other portion of that state, may, by force of arms, endeavor to establish its independence. Again, a state may change its form of government, *e.g.*, from a monarchy to a republic, thereby altering the authority with which foreign governments must treat in dealing with it. Any and all of these changes may be taken note of by existing members of the family of nations through the exercise of the power of recognizing the *de facto* or *de jure* independence, the belligerency or insurgency of new states, or changes of government in established states.

The Constitution of the United States is silent upon the location, among the organs of government, of the power of recognition. The general practice of nations, however, indicates that this power rests in that organ of government which is vested with the conduct of foreign relations.[1] As indicated, furthermore, by international practice, the modes of recognition fall, in general, into two groups, namely,

[1] Wilson, *Handbook of International Law*, 26.

those which are direct or express and those which are implied. Where recognition is accorded solely by the method of express declaration, such declaration, although addressed to the recognized state, can be communicated only by the indirect method, since, hypothetically at all events, diplomatic relations with the state in question are still nonexistent.[1] In 1903 the United States expressly recognized by treaty the independence of Panama. In this case, however, we had already impliedly recognized the new republic by entering into diplomatic relations with it.[2] Recognition of belligerency or of insurgency may be accorded by the issuance of a proclamation of neutrality. Thus, President Cleveland by a proclamation issued in 1895, recognized the existence of an insurrection in Cuba.[3] Great Britain similarly recognized the belligerency of the Confederacy in May, 1861.[4]

The more usual method of recognition, however, has been that of necessary implication arising from other acts, such as sending and receiving diplomatic representatives and entering into conventional relations. Hence it is not necessary that there should be, in the Constitution, any express grant of the power of recognition to any particular organ of the government; this power may be exercised incidentally by the appropriate organ in connection with the exercise of express constitutional powers.

[1] Thus in a proclamation of April 22, 1884, Secretary Freylinghuysen effectually recognized the newly established Congo Free State by providing for an official salute to its flag. Sen. doc. 40, 54th Cong., 2nd sess., p. 11.

[2] In receiving a minister from Panama, President Roosevelt, however, used language expressly recognizing the independence of that republic, although such recognition would have been implied from the mere act of receiving him. *For. Rels. of U. S.*, 1903, p. 245.

[3] Richardson, *Mess. and Pap. of the Presidents*, IX, 591. Cf. *The Three Friends*, 166 U. S., 1, in which the court followed the President in recognizing a state of insurgency, as distinguished from belligerency, in Cuba.

[4] Since President Lincoln had previously proclaimed a blockade of the Confederate ports, the British action was justifiable from the standpoint of international law. When, however, in 1867, an insurrection broke out in Abyssinia, a resolution was introduced in the Senate providing for a declaration of our neutrality between the king of that country and Great Britain. Cong. Globe, 40th Cong., 1st sess., Nov. 29, 1867, p. 810.

CONGRESSIONAL INFLUENCE UPON RECOGNITION.

It has sometimes been asserted that Congress has a concurrent power to accord recognition, and the executive department has occasionally shown a disposition to concede to that body some influence in this field. The question came up prominently during Monroe's administrations in connection with the proposal to recognize the South American states which had revolted from Spain. Before the President took definite action in the matter, Henry Clay, Speaker of the House of Representatives, sought, in 1818, to secure an amendment to an appropriation bill authorizing the expenditure of a certain sum "for one year's salary and an outfit to a minister" to the South American provinces.[1] As originally introduced, the amendment described these provinces as "the independent provinces of the River Plata." This wording, however, was shortly afterwards changed so as to make the appropriation for the minister to the "United Provinces of the Rio de la Plata, whenever the President shall deem it expedient to send a minister" thereto.[2] The amendment was not adopted, but, in 1821, the House passed a resolution proposed by Clay which provided that that body would "give its constitutional support to the President whenever he may deem it expedient to recognize the sovereignty and independence of any of the said provinces."[3] In the following year the President sent a message to Congress expressing the opinion that the provinces ought to be recognized and requesting the coöperation of the legislative branch.[4] In response, Congress appropriated a sum of money to defray the expenses of "such missions to the independent nations on the American continent as the President may deem proper."[5] The passage of this act, however, did not of itself constitute a recognition

[1] Annals of Cong., 15th Cong., 1st sess., II, 1468.
[2] *Ibid.*, 1500.
[3] Annals of Cong., 16th Cong., 2nd sess.
[4] Richardson, *Mess. and Pap. of the Presidents*, II, 117.
[5] Annals, 17th Cong., 1st sess., II, app., 2603.

of any particular states, since discretion in the matter remained to the President.[1] The actual recognition was then extended by the President, by sending and receiving diplomatic representatives from the various South American republics.

During the debate on the recognition of the former Spanish-American provinces no claim was made that Congress could effect such recognition through an express declaration. But it was argued that recognition could be extended incidentally or indirectly through the exercise of one of the undoubted legislative powers of Congress, such as that of making appropriations. Clay also held on this occasion that this might be done through the exercise by Congress of the power to regulate foreign commerce.[2] Although the power of Congress thus to effect recognition was not admitted by the President, Monroe, by his action, indicated that, in a matter of such importance, the coöperation and support of Congress was desirable, especially since the act of recognition might be considered a *casus belli* by Spain. The incident shows, however, that the power to recognize, as well as the responsibility for recognition, rests with the President.

On other occasions the Executive has seemed to concede to Congress a concurrent power of recognition. In 1836 the Senate and House of Representatives passed resolutions declaring that "the independence of Texas ought to be acknowledged by the United States whenever satisfactory information shall be received that it has in successful operation a civil government capable of performing the

[1] Henry Winter Davis, chairman of the House Committee on Foreign Affairs, maintained in 1864 that this act constituted and completed the recognition of the new nations and that the sending of ministers to some or all of them "was a matter of executive discretion, not at all essential to or connected with the fact of recognition." House rept. 129, 38th Cong., 1st sess., p. 4. This view, however, does not seem to be well founded.

[2] Annals, 15th Cong., 1st sess., II, 1616. Clay maintained the same proposition in 1836 when, as chairman of the Senate Committee on Foreign Relations, he made a report on the recognition of the independence of Texas. Sen. doc. 231, 56th Cong., 2nd sess., part 6, p. 73.

duties and fulfilling the obligations of an independent power."[1] In December of the same year President Jackson sent a message to Congress on the question of acknowledging the independence of Texas, saying:

"Nor has any deliberate inquiry ever been instituted in Congress or in any of our legislative bodies as to whom belonged the power of originally recognizing a new State—a power the exercise of which is equivalent under some circumstances to a declaration of war; a power nowhere expressly delegated, and only granted in the Constitution as it is necessarily involved in some of the great powers given to Congress, in that given to the President and Senate to form treaties with foreign powers and to appoint ambassadors and other public ministers, and in that conferred upon the President to receive ministers from foreign nations. In the preamble to the resolution of the House of Representatives it is distinctly intimated that the expediency of recognizing the independence of Texas should be left to the decision of Congress. In this view, on the ground of expediency, I am disposed to concur, and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the Executive, either apart from or in conjunction with the Senate, over the subject. It is to be presumed that on no future occasion will a dis-

[1] Debates, 24th Cong., 1st sess., p. 4621. In the Senate the adoption of the resolution was preceded by the submission of a report by Henry Clay from the committee on foreign relations, June 18, 1836, in which it was said:

"The recognition of Texas as an independent power may be made by the United States in various ways: First, by treaty; second, by the passage of a law regulating commercial intercourse between the two powers; third, by sending a diplomatic agent to Texas, with the usual credentials; or, lastly, by the Executive receiving and accrediting a diplomatic representative from Texas, which would be a recognition as far as the Executive only is competent to make it. In the first and third modes the concurrence of the Senate, in its executive character, would be necessary; and in the second, in its legislative character. The Senate alone, without the coöperation of some other branch of the Government, is not competent to recognize the existence of any power. The President of the United States, by the Constitution, has the charge of their foreign intercourse. Regularly he ought to take the initiative in the acknowledgment of the independence of any new power. . . . If, in any instance, the President should be tardy, he may be quickened in the exercise of his power by the expression of the opinion or by other acts of one or both branches of Congress, as was done in relation to the republics formed out of South America. But the committee do not think that on this occasion any tardiness is justly imputable to the Executive." Sen. doc. 231, 56th Cong., 2nd sess., part 6, pp. 73-74.

pute arise, as none has heretofore occurred, between the Executive and Legislature in the exercise of the power of recognition. It will always be considered consistent with the spirit of the Constitution, and most safe, that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished."[1]

Congress responded to the President's message by passing an act appropriating money "for the outfit and salary of a diplomatic agent to be sent to the republic of Texas, whenever the President may receive satisfactory evidence that Texas is an independent power, and shall deem it expedient to appoint such a minister."[2] Shortly afterwards, President Van Buren recognized Texas by sending to the republic a *chargé d'affaires*. The extent to which the President deferred to Congress in this case in the matter of recognition is rather exceptional. The act passed, however, although indicating financial and moral support of the Executive in the project, can hardly be considered as, of itself, a complete official act of recognition by our Government. The discretion as to when the proposed action should be taken, or whether it should be taken at all, was left by Congress to the President.[3] Moreover, the President could have recognized Texas, had he seen fit to do so, without waiting for the passage of an act or the expression of any opinion on the part of Congress.

In 1849 Secretary Clayton, in his instructions to A. Dudley Mann, the special and confidential agent of the United States in Hungary, seems to have surpassed even President Jackson in conceding to Congress a power of recognition.[4] No actual recognition, however, was accorded

[1] Richardson, *Mess. and Pap. of the Presidents*, III, 267.
[2] 5 Stat. at L., 170.
[3] As confirming this statement, see the message of President McKinley, December 6, 1897, Richardson, *op. cit.*, X, 146.
[4] Secretary Clayton said: "Should the new government prove to be in your opinion firm and stable, the President will cheerfully recommend to Congress,

in that instance, as our emissary reported that the conditions were not propitious for such action.

The next assertion of Congressional power over recognition occurred in 1864, when, as we have seen,[1] the House of Representatives adopted a resolution declaring that "Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as well in the recognition of new powers as in other matters; and it is the constitutional duty of the President to respect that policy," etc.[2] The adoption of the resolution was preceded by the submission of a report from the Committee on Foreign Affairs designed to show that the precedents were in favor of a Congressional power of recognition.[3] In spite of the passage of this resolution, however, President Lincoln kept control of the situation created by the presence of the French in Mexico.

On December 21, 1896, the Senate Committee on Foreign Relations submitted a report recommending the adoption of a joint resolution declaring "that the independence of the Republic of Cuba be, and the same is hereby, acknowledged by the United States of America."[4] On the same day Senator Bacon offered a concurrent resolution declar-

at their next session, the recognition of Hungary; and you might intimate, if you should see fit, that the President would in that event be gratified to receive a diplomatic agent from Hungary in the United States, by or before the next meeting of Congress; and that he entertains no doubt whatever that, in case her new government should prove to be firm and stable, her independence would be speedily recognized by that enlightened body." Senate Ex. doc. 43, 31st Cong., 1st sess., pp. 5-6 (June 18, 1849).

[1] *Supra*, Chap. I.

[2] Cong. Globe, 38th Cong., 2nd sess., Dec. 19, 1864, pp. 48, 66, 67.

[3] House rept. 129, 38th Cong., 1st sess. In this report it is maintained that Hayti and Liberia were first recognized by an act of Congress of July 5, 1862. The provision referred to, however, was a clause in an appropriation bill which merely authorized the President, with the advice and consent of the Senate, to appoint diplomatic representatives to the republics of Hayti and Liberia. The usual proviso stipulating that the recognition should take place whenever the President should deem it expedient did not appear. The act, in itself, did not constitute a full official recognition. The President might have sent such diplomatic representatives, had the act not been passed; on the other hand, he could not have been compelled to exercise the authority which the act purported to confer.

[4] Senate rept. 1160, 54th Cong., 2nd sess., reprinted in Sen. doc. 231, 56th Cong., 2nd sess., part 7, p. 64.

ing that the question of recognition "is one exclusively for the determination of Congress."[1] Recognition of Cuba at that time, however, was opposed by President Cleveland,[2] and President McKinley later adopted the same attitude. In his message of December 6, 1897, the latter said: "I regard the recognition of the belligerency of the Cuban insurgents as now unwise, and therefore inadmissible. Should that step hereafter be deemed wise as a measure of right and duty, the Executive will take it."[3] On January 11, 1897, the results of a thorough investigation of the precedents relating to the power of recognition, made by the Senate Committee on Foreign Relations, were published, and they showed that recognition is distinctly an executive function and that Congress can exercise no influence over it except indirectly. "In the department of international law, properly speaking," it was declared, "a Congressional recognition of belligerency or independence would be a nullity."[4] In view of the attitude of the President and of many members of the Senate, the joint resolution, as finally passed, did not assume, by that method, to confer recognition upon the Cuban republic, but merely recited that "the people of the island of Cuba are, and of right ought to be, free and independent."[5] This was not generally considered at the time as a Congressional recognition of the independence of a new state; and this view subsequently received the sanction of the Supreme Court.[6]

[1] The full text of the Bacon resolution was as follows: "The question of the recognition by this Government of any people as a free and independent nation is one exclusively for the determination of Congress in its capacity as the law-making power; this prerogative of sovereign power does not appertain to the Executive department of the Government except in so far as the President is, under the Constitution, by the exercise of the veto, made a part of the law-making power of the Government." Congressional Record, December 21, 1896, vol. 29, p. 357. The resolution was referred to the Committee on the Judiciary, from which it seems never to have emerged.

[2] Richardson, *Mess. and Pap. of the Presidents*, IX, 719.

[3] Richardson, *op. cit.*, X, 134.

[4] Senate doc. 56, 54th Cong., 2nd sess. The conclusions presented are reprinted in Corwin, *President's Control of Foreign Relations*, 79-80.

[5] 30 Stat. at L., 738 (April 20, 1898).

[6] Neely *v.* Henkel, 180 U. S., 124-5, where it was said: "The contention that the United States recognized the existence of an established government

EXECUTIVE CONTROL OVER RECOGNITION

The Constitution, as we have seen, does not expressly confer the power of recognition upon any organ of the Government. But, in determining the location of this power, we may assume as a general principle that "all duties in connection with foreign relations not otherwise specified fall within the sphere of the executive."[1] Moreover, the investment in the President of the power of recognition may be inferred from the expressly granted powers of appointing and receiving diplomatic representatives and of participating in the making of treaties, and from the general grant of executive power. In appointing diplomatic representatives and in entering into international agreements, the President usually acts in conjunction with the Senate; and, to that extent, the Senate may participate in the exercise of the power of recognition. But the President may, and frequently does, send diplomatic agents and enter into international agreements without consulting the Senate.[2] Even in appointing regular diplomatic representatives, the President takes the initiative and, moreover, may sometimes make the appointment during the recess of the Senate and thus complete, on his sole authority, the act of recognition even though the Senate, at its next session, fails to confirm the appointment.[3] Furthermore, when

known as the Republic of Cuba. . . is without merit. The declaration by Congress that the people of Cuba were and of right ought to be free and independent was not intended as the recognition of the existence of an organized government instituted by the people of that Island in hostility to the government maintained by Spain. . . . Both the legislative and executive branches of the government concurred in not recognizing the existence of any such government as the Republic of Cuba." (1901.)

[1] Sen. doc. 56, 54th Cong., 2nd sess., p. 18.

[2] The sending of a mere Presidential agent need not be considered as amounting to an act of recognition, certainly not to recognition of *de jure* independence. It may, however, be tantamount to a recognition of a *de facto* government. Thus President Wilson, although refusing to recognize the Huerta régime as the *de jure* government of Mexico, recognized it as the *de facto* government by sending special Presidential agents to it.

[3] In this case "the necessity for a later confirmation of the appointment would not operate as a delay of recognition, nor would a refusal to confirm amount to a withdrawal of recognition—it would merely require an appointment agreeable to the Senate." C. A. Berdahl, "The Power of Recognition,"

the President performs the act of recognition by receiving a foreign minister, or by granting an exequatur to a foreign consul, there is no question that the function belongs exclusively to him.[1]

Recognition through receiving a foreign minister is the customary, regular, and most proper method. It is the most proper method because, ordinarily, the application for recognition should come from the new state or government. This was the method pursued in 1793, on the first occasion when we granted recognition to a foreign government; President Washington received M. Genet as the minister to the United States from the French Republic.[2] As has been pointed out, "the power to receive public ministers, which is confided in the President alone, implies the power to decide who should be received. And this implies the power to examine their credentials and ascertain whether the foreign potentates, by whom the credentials are made out, are, in fact, sovereigns."[3]

The predominating and controlling position of the President in the matter of recognition rests fundamentally upon the fact, as we have seen, that that official is the sole medium

Am. Jour. Internat. Law, XIV, 525 n. Moreover, as was pointed out in the Senate document previously cited, where the President and Senate participate in recognizing a new state by sending a diplomatic representative thereto, no previous legislation by Congress is necessary, "as the envoy would be an officer whose position is established by the Constitution itself, and who could either give his services gratuitously or be reimbursed out of a contingent fund, as was done in the case of President Monroe's South American commissioners in 1818." Sen. doc. 56, p. 29.

[1] Recognition was extended by the President through the issuance of an exequatur in the cases of Guatemala, Uruguay, Venezuela, and New Granada. Senate doc. 40, 54th Cong., 2nd sess., pp. 11, 13.

[2] Sen. doc. 40, cited above, p. 2.

[3] Senate doc. 56, cited above, p. 19. As showing how far some of the predictions of the framers of the Constitution fell short, it is interesting to note Hamilton's assertion in the *Federalist* (No. 69) that the President's power to receive ambassadors and other public ministers "is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government." Hamilton very soon realized his mistake, for in the first of the series of letters signed "Pacificus" and dated June 29, 1793, he declared that the right of the President to receive ambassadors and other public ministers "includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized or not." *Works* (Lodge ed.), IV, 144.

of communication between the United States and foreign governments.[1] In consequence, it is an established rule that diplomatic representatives of foreign governments—and the same is true of our own diplomats—hold direct communication with the executive branch of the Government, and not with Congress. Therefore, even if Congress had a power of recognition, it could exercise it only in an indirect and roundabout manner.[2] Moreover, the President is better qualified than Congress to determine whether recognition should be accorded, because he is ordinarily in possession of fuller and more authentic information as to the facts of the situation. Recognition of a *de facto* government, as has been pointed out, "is in law the recognition of a fact. This fact is the existence of a politically organized community having an established seat of government, enforcing obedience to its mandates within its limits in a civilized and orderly manner, and asserting its independence, with a reasonable chance of being able to make good its assertion."[3]

These are questions of fact which, as a rule, the President alone is able to decide upon a sufficient basis of information. Moreover, if he does not have the necessary information, he can secure it by sending special Presidential agents for that purpose. This was done, for example, in 1849, when the President sent A. Dudley Mann as a special and confidential agent to inquire into the prospects of Hungarian independence; as a result of his unfavorable report, recognition was not accorded. The same procedure was adopted by President Monroe in 1817, when he sent commissioners to South America to inquire into the ability of the revolted Spanish provinces to establish their independence. Again, in 1836 President Jackson sent an agent to Texas to investigate conditions with a view to the recognition of that re-

[1] *Supra*, Chap. I.
[2] Cf. Corwin, *President's Control of Foreign Relations*, 82.
[3] E. Maxey, "Legal Aspects of the Panama Situation," *Yale Law Jour.*, XIII, 85 (Dec., 1903).

public if the situation warranted it. Upon information secured in this way, the President, in all of these cases, based his action. Congress could not have acted with sufficient information, except in so far as it might have been voluntarily transmitted by the President. "Where knowledge is not granted, responsibility is absolved. Recognition, therefore, necessarily implies previous lawful command of all official sources of information by the department of government charged with the duty of decision."[1]

That the President is in practically exclusive control of the power of recognition, except when the Senate may participate in the making of treaties or appointments, is farther indicated by recent practice. The policy whereby the infant republic of Panama was somewhat hastily recognized shortly after the insurrection of 1903 was adopted and carried out by President Roosevelt and Secretary Hay.[2] President Wilson conceived and put into execution his own theory as to the policy which our Government should pursue in recognizing rapidly shifting Latin-American governments. In his address of September 2, 1916, accepting his renomination, he said: "So long as the power of recognition rests with me, the Government of the United States will refuse to extend the hand of welcome to anyone who obtains power in a sister republic by treachery and violence." It was in pursuance of this policy that he refused to recognize Huerta in Mexico and finally brought about his downfall. It was also by the sole policy and action of the President that the government of Carranza was recognized, first as the *de facto,* and later as the *de jure,* government of that country.[3]

[1] Judge W. L. Penfield (Solicitor of the State Department), "Recognition of a New State—Is It an Executive Function?" *American Law Review,* XXXII, 406 (1898).

[2] Latané, *America as a World Power,* 215-220.

[3] The same statement may be made with reference to the recognition of Czecho-Slovakia in 1918. A Congressional attempt to interfere in the President's exclusive control over recognition was made when, on December 3, 1919, Senator Fall introduced a concurrent resolution providing that "the President be and he is hereby requested to withdraw from Venustiano Carranza the rec-

It may be objected that the practice which puts the power of recognition exclusively in the hands of the executive is dangerous, in that it assigns to one man too much discretion in making decisions which may vitally affect the peace and safety of the nation. It is true that the action of our Government in according recognition to a new state may be regarded as a *casus belli* by some third power. But the exercise of other powers granted to the President by the Constitution or established in practice as belonging exclusively to him may involve the nation in similar hazards. This circumstance does not reduce the extent of the power; but it strongly suggests that "it is most advisable as well as proper for the Executive first to consult the legislative branch as to its wishes and postpone its own action if not assured of legislative approval."[1] The power and the responsibility, nevertheless, remain with the President, who may give to expressions of opinion on the part of Congress such weight as they seem to him to deserve.[2]

THE COURTS AND RECOGNITION

The conclusions reached above on the location of the power of recognition are confirmed by the testimony of the

ognition heretofore accorded him by the United States as President of the Republic of Mexico and to sever all diplomatic relations now existing between this Government and the pretended government of Carranza." Congressional Record, vol. 59, p. 73. The resolution was referred to the committee on foreign relations, but was never reported out, for a few days later President Wilson wrote Senator Fall a letter in which he said: "I should be gravely concerned to see any such resolution pass the Congress. It would constitute a reversal of our constitutional practice, which might lead to very great confusion in regard to the guidance of our foreign affairs. I am convinced that I am supported by every competent constitutional authority in the statement that the initiative in directing the relations of our Government with foreign governments is assigned by the Constitution to the Executive, and to the Executive only." *New York Times*, December 9, 1919.

[1] Senate doc. 56, p. 2.

[2] Judge Penfield, in the article previously quoted, raises, without deciding, the question as to whether or not Congress is competent, by a two-thirds vote over the President's veto, in the legitimate exercise of the legislative power, to enact a statute having the indirect, but decisive and conclusive effect of granting recognition (*Am. Law Review*, XXXII, 408). As Congress has never attempted to exercise such a power, the probabilities would seem to be against its existence.

courts. It is true that, in several cases, the judicial tribunals have apparently conceded the power of recognition to the political departments of the Government, including both the legislature and the executive. Thus a few years ago the Supreme Court declared that "what is the *de jure* government of a country is a strictly political and not a judicial question and the determination of the question by the executive and legislative departments of the recognizing country gives the courts of the latter judicial notice of the recognition."[1] In other cases, however, the executive department has been distinctly indicated as that to which the power of recognition belongs. Thus in an early case Marshall, on circuit, said: "Before a nation could be considered independent by the judiciary of foreign nations, it was necessary that its independence should be recognized by the executive authority of those nations."[2] In 1852 Chief Justice Taney declared that the question whether Texas was or was not an independent state "was a question for that department of our government exclusively which is charged with our foreign relations," and the context shows that he meant the executive department.[3] In the case of the *Itata,* decided in 1893, the circuit court of appeals held that "the law is well settled that it is the duty of the courts to regard the status of the [Chilean] Congressional party in the same light as they were regarded by the executive department of the United States at the time the alleged offenses were committed."[4] It is well settled that the courts will take judicial notice of recognition accorded by the President, and in a recent case the Supreme Court declared that the decision of the President in recognizing

[1] Pearcy *v.* Stranahan, 205 U. S., 257.

[2] United States *v.* Hutchings, 26 Fed. Cas. 440; Fed. Cas. No. 15,429 (1817). In United States *v.* Palmer, however, decided about the same time, Chief Justice Marshall referred to the power as vested in both of the political departments (2 Wh., 643).

[3] Kennett *v.* Chambers, 14 How., 50.

[4] 56 Fed. 510. Cf. U. S. *v.* Trumbull, 48 Fed., 104; Williams *v.* Suffolk Insurance Co., 13 Pet., 415; Jones *v.* United States, 137 U. S., 202.

the government of Carranza as the *de facto*, and later as the *de jure*, government of Mexico "binds the judges as well as all the other officers and citizens of the government."[1]

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[1] Ricaud *v.* American Metal Co., 246 U. S., 304 (1918). Cf. Oetjen *v.* Central Leather Co., 246 U. S., 297; and see E. D. Dickinson, "International Recognition and the National Courts," *Michigan Law Rev.*, XVIII, 531-535 (April, 1920).

CHAPTER VIII

THE TREATY-MAKING POWER: GENERAL PRINCIPLES

IT has been maintained that the Government of the United States, even in the absence of any constitutional provision on the subject, would have the power to make treaties, possessing it as an independent member of the family of nations and "as an attribute of sovereignty."[1] In view, however, of the existence of a direct constitutional provision on the subject, it is unnecessary to pass upon the question as to the inherence in our government of such an extra-constitutional power. The one provision of the Constitution relating to the making of treaties is as follows: "He [the President] shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the Senators present concur."[2] It is significant that this provision is found in the article dealing with the executive rather than in that devoted to the legislative branch. It was considered, however, that treaty-making is neither wholly executive nor legislative in character, but is a distinct and composite function, in which the executive and legislative branches should alike participate.[3]

THE TREATY CLAUSE IN THE CONSTITUTIONAL CONVENTION

During the proceedings of the Federal Convention the Senate was, at first, given full control of treaty-making,

[1] Butler, *Treaty-Making Power of the U. S.*, I, 5.
[2] Art. II, sect. 2, cl. 2.
[3] *Federalist*, No. 75. This idea was strengthened by the general favor with which the principle of checks and balances was received.

though near the close of the deliberations this arrangement was modified so as to associate the President and Senate together in the performance of that work. Several influences led many members to favor intrusting the treaty-making power to the Senate rather than to the executive. These were: (1) fear of the autocratic power which might result from placing this important function in the hands of one man; (2) a desire to depart from English precedent; (3) the force of practice under the preceding régime, when, for lack of a president, the Continental and Confederate Congresses had directed the foreign relations of the country, including the work of treaty-making;[1] and (4) the feeling that, since the states were prohibited from making treaties, some compensation should be granted them by giving this power to their representatives in the upper house, thereby protecting them against injury at the hands of the federal government in its control over foreign relations. So strong were these influences that, during a considerable portion of the session of the convention, the power of making treaties was assigned exclusively to the Senate,[2] as was also the power of appointing ambassadors. Had these proposals been finally adopted, they would very largely have taken away from the executive the control of foreign relations. They were opposed, however, by some of the leading men in the convention. Madison observed that "the Senate represented the states alone, and for this as well as for other obvious reasons, it was proper that the President should be an agent in treaties."[3] With reference to the proposal that the upper house should appoint ambassadors, "Gouverneur Morris argued against the appointment of officers by the Senate. He considered that body as too numerous for the purpose; as subject to cabal; and as devoid

[1] It is of course true that these Congresses exercised both legislative and executive powers, but they were primarily legislative bodies.

[2] Cf. Pinckney to J. Q. Adams, Dec. 30, 1818, Farrand, *Records of the Federal Convention*, III, 427. See also *ibid.*, II, 169, 183.

[3] Farrand, *op. cit.*, II, 392.

of responsibility."[1] These arguments prevailed, and, as finally decided, the President and Senate are associated together in both the treaty-making and appointing powers. This outcome was doubtless influenced, too, by the consideration that in this way the exercise of these powers would be subjected to the principle of checks and balances.

An attempt was made near the close of the Convention to associate the House of Representatives in the treaty-making power, on the ground that "as treaties are to have the operation of laws, they ought to have the sanction of laws also."[2] This proposal was defeated, however, on the ground that "the necessity of secrecy in the case of treaties forbade a reference of them to the whole legislature."[3] Madison also suggested the inconvenience of requiring a legal ratification of treaties of alliance.[4]

It was not apparently thought by the members of the convention that the association of the Senate with the President would substantially impair the requirement of secrecy. This confidence was expressed, and the conditions necessary for success in foreign negotiations were admirably stated, by President Washington several years later in his message to the House of Representatives on the Jay treaty, as follows:

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

[1] Farrand, *Records of the Federal Convention*, II, 389.
[2] Wilson of Pa., in Farrand, II, 538.
[3] Sherman of Conn., *ibid.*
[4] *Ibid.*, II, 392. The fact that the term of senators is three times as long as that of members of the lower house, enabling the Senate to give more continuous attention to foreign affairs and to adopt and maintain a more consistent foreign policy, constitutes an additional reason why the Senate alone should be associated with the President in treaty-making.

The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members."[1]

The expectation of the framers of the Constitution was that the Senate, as a comparatively small body, would act with the President as an executive council for the purpose of making treaties and confirming appointments to important offices. It is worthy of note, however, that the association of the Senate with the President for these purposes was not in both cases provided for in the same language. In the case of appointments, it is provided that the President "shall nominate, and by and with the advice and consent of the Senate shall appoint," etc.[2] It is thus implied that the President has the sole right of nomination, and that the advice and consent of the Senate operate only upon the confirmation of the appointment, although the President must still issue the commission in order to complete the process. On the other hand, the treaty-making clause provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."[3] It does not say that the President shall negotiate, and by and with the advice and consent of the Senate shall ratify, treaties; the advice and consent of the Senate apparently operate upon the whole process of treaty-making, including negotiation and ratification. It appears, however, from contemporary expositions of this clause that the Senate was not intended to have an equal and coördinate share with the President in the actual business of negotiation. Thus, in the Federalist, Jay points out that

"It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate

[1] Richardson, *Mess. and Pap. of the Presidents*, I, 194-5.
[2] Art. II, sect. 2, par. 2.
[3] *Ibid.*

dispatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. . . . There doubtless are many . . . who would rely on the secrecy of the President, but who would not confide in that of the Senate and still less in that of a large popular assembly. The convention has done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest."[1]

This idea was seconded by Hamilton in another number of the Federalist, where he says:

"The qualities elsewhere detailed, as indispensable in the management of foreign negotiations, point out the executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole, or a portion of the legislative body in the office of making them."[2]

STAGES IN THE PROCESS OF TREATY-MAKING

In considering the relative influence and control wielded by the President and the Senate in treaty-making, it is desirable to bear in mind the various steps or stages commonly followed in the process of making treaties. As a rule, there are four distinct steps: (1) negotiation, including the advice and consent of the Senate to ratification; (2) ratification; (3) exchange of ratifications; and (4) proclamation. Treaties are proclaimed by the President and are published in the Statutes at Large as a means of officially acquainting the people with their texts, which forthwith become parts of the supreme law of the land. Such proclamation, however, has no direct bearing on foreign relations and is not neces-

[1] *Federalist*, No. 64.
[2] *Ibid.*, No. 75.

sary to the validity of a treaty in international law.[1] The function of the Senate in treaty-making is popularly spoken of as ratification. But this is an error. The advice and consent of the Senate is a necessary prerequisite to the ratification of a treaty; the act of ratification itself is performed by the President (or his agents), as is also the exchange of ratifications with the representative of the foreign government.[2] In reality, therefore, the President alone fully controls the last three steps,[3] and he and the Senate are associated together in the first step only, *i.e.*, negotiation. This limitation of the Senate's authority to the first stage is not expressly set up by the Constitution, but is brought about in part through international usage and diplomatic practice in treaty-making, and in part through the implications of certain provisions of the Constitution, other than the treaty-making clause, which combine to make the President the spokesman of the nation in foreign relations. These causes, in turn, rest upon fundamental differences in organization between the executive and the legislature, or the upper branch thereof.

It should be noted, however, that treaties sometimes contain a provision which purports to place a limit upon the time within which they may be ratified and the ratifications may be exchanged. If this limit is not observed, it is the usual, though not invariable, practice to secure the consent of the Senate to an extension of the period. Instructions to American diplomatic officers charged with the negotiation of treaties are to the effect that ratification should be

[1] The issuance of the proclamation is a mere ministerial act which follows as a matter of course after the first three stages have been completed, although it is not compellable by mandamus.

[2] The fact that the President ratifies treaties is often lost sight of even by writers on international law. Thus, A. S. Hershey says: "Of course there has never been any question of the right to refuse ratification in the case of States in which, like the United States, the power of negotiation and ratification are in different hands." *Essentials of International Public Law*, p. 315, n. 16.

[3] Except, of course, that the consent of the foreign government must be had to the exchange of ratifications.

promised, not within a given time, but only as soon as possible. This rule has been usually, though not invariably, followed.[1]

It might be thought, at first sight, that since it would manifestly be a usurpation of power for the Senate to engage in the conduct of diplomatic correspondence, that body can not participate with the President in the negotiation of a treaty. If by negotiation we mean the actual conduct of *pourparlers* between the representatives of the two governments, this is true. It was in this narrow sense that Senator Spooner used the term when, in his debate in the Senate with Senator Bacon in 1906, he said: "From the foundation of the government, it has been conceded in practice and in theory that the Constitution vests the power of negotiation . . . exclusively in the President."[2] Senator Bacon admitted that "undoubtedly the power to negotiate within that narrow limit is one which can only be exercised by the President, because he alone under this clause can have direct communication with the foreign power." But the term negotiation may be used in a broader sense, as embracing all acts of the proper governmental authorities from the initiation of the project of a treaty until its ratification by the President. In this sense the term "negotiation" is practically equivalent to the "making" of treaties, and it embraces not only the *pourparlers* incident to the framing of the terms but also the action of the Senate in advising and consenting to ratification. In this broader sense the process of negotiating a treaty may be divided

[1] Cf. Crandall, *Treaty Making Power*, 89-92. An attempt was made by Senator Brandegee to amend the Senate resolution advising and consenting to the ratification of the treaty of peace with Germany by requiring that, as a part and condition of the resolution of ratification, the instrument of ratification should be deposited within ninety days after the adoption of the resolution by the Senate. The amendment was rejected, however, by a vote of 41 to 42. See Congressional Record, March 19, 1920, vol. 59, pp. 4890, 4895. This proposed amendment raised the question whether the Senate's power of suggesting amendments should not properly be limited to the substance of the treaty, so as not to extend to an attempted control over the discretion of the President in matters of procedure connected with putting the treaty into effect.

[2] Quoted in Corwin, *President's Control of Foreign Relations*, 170-1.

into two stages or sets of operations, the first extending from the initiation of the project up to the act of attaching their signatures by the representatives of the contracting parties; the second extending from this step to ratification by the President. The first stage may be called preliminary negotiations, and the second, especially if the Senate proposes amendments, may be termed supplementary negotiations.

There are two views as to the rights of the Senate in treaty-making. The first is that the rights of that body extend to both of the two stages as described above; the second is that these rights are restricted to the second of the two stages. The first view was supported by Senator Bacon in his debate with Senator Spooner in 1906. The functions of the Senate, he maintained, are not confined merely to answering 'yes' or 'no' to the proposition submitted by the President. "On the contrary . . . in the making of treaties it is proper for the Senate to advise at all stages. . . . We do not advise men after they have made up their minds and after they have acted; we advise men while they are considering, while they are deliberating, and before they have determined and before they have acted."[1] The same view was taken by Senator La Follette in the debate in the Senate in 1919 on the Treaty of Versailles. "It is idle," he declared, "to say that the Constitution means that the President should advise with the Senate after the treaty has been put in final form, and has been duly signed by the accredited delegates to the peace conference."[2]

On the other hand, it has been held that the Senate can participate in the negotiations only after the signature of the treaty, which, until ratified by the President, is still technically a mere project. Thus, Senator Lodge says: "The right of the Senate to amend has always been freely

[1] *Op. cit.*, p. 181; *North American Review*, CLXXXII, 506.
[2] Cong. Record, Nov. 6, 1919, vol. 58, p. 8481.

used at all periods of our history and of course will continue to be exercised, because it is the only method by which the Senate can take part in the negotiations, as the Constitution intended it to do."[1] That the action of the Senate in passing on a treaty submitted to it by the President may be considered as one phase of the negotiation of the treaty is also maintained by other authorities. Thus, Senator Bacon, in the debate referred to, put the following rhetorical question: "When the Senate has amended a proposed treaty and the President thereafter submits the amendment to the foreign power for its consideration, has not the Senate taken part in the negotiation of that treaty?"[2] This point of view is clearly taken by John W. Foster in his "Practice of Diplomacy":

"While," he says, "the negotiation of treaties is conducted by or under the direction of the secretary of state, such negotiation cannot properly be said to be concluded until the 'advice of the senate' is obtained, which, as noted, is sometimes secured in advance, but usually not until the treaty is submitted to the Senate for ratification. That body being made by the Constitution a part of the treaty-making power, the amendments which it may see proper to submit for the consideration of the foreign government which is a party to the proposed treaty are as much a stage of the negotiations as the preceding action of the secretary of state."[3]

In reality, there is no necessary conflict between the apparently opposing views here presented. One group of writers are speaking of practical influence, while the other have in mind rather legal control. The Senate may exercise influence through its advice at all stages in the process of treaty-making. As a rule, however, the more important power of the Senate is not the giving of advice, but the granting or withholding of consent. The advice of the

[1] *Scribner's Magazine*, XXXIV, 548. Cf. the statement of the same writer, *ibid.*, XXXI, 41: "Senate amendments are simply a continuance of the negotiation begun by the President."

[2] Corwin, *op. cit.*, 189.

[3] *Op. cit.*, 276-7.

Senate is not, of itself, more weighty than would be that of any other body similarly constituted. But such advice derives weight from the fact that the Senate's consent must be secured before a treaty can be completed. The Senate may tender its advice before the conclusion of the treaty, and the President may or may not be influenced by it.[1] The Senate's function in consenting to a proposed treaty or in withholding its consent, however, must be respected by the President;[2] for the action of the Senate in this matter has, of course, a legal effect upon the validity of the treaty. From the legal point of view, therefore, the Senate can exercise control through its consent or non-consent during the supplementary negotiations only. But from the practical point of view it may happen that the advice of the Senate, even when tendered during the preliminary negotiations has controlling weight.

Such practical control may operate either positively or negatively. If the fact that the Senate was not consulted during the preliminary negotiations has an appreciable effect in inducing that body to reject a treaty—or to propose unacceptable amendments, whereas it would otherwise have approved without such amendments—it may reasonably be maintained that some practical control, even though indirect, is exercised by the Senate over the first stage in the process of negotiation. The power of the Senate to reject a treaty, or to propose amendments thereto after the instrument has been submitted to that body, may thus enable it to exert a retroactive control to a certain degree over the preliminary negotiations.

[1] As was said in a Senate report: "The initiative lies with the President. He can negotiate such treaties as may seem to him wise, and propose them to the Senate for the advice and consent of that body, which is as free and independent in its action upon the same as the President is in exercising his power of initiation and negotiation. . . . Whether he will negotiate a treaty and when and what its terms shall be, are matters committed by the Constitution entirely to the discretion of the President." Rept. of Senate Foreign Relations Committee, Dec. 15, 1902, Senate doc. 47, 57th Cong., 2d sess., p. 2.

[2] President Roosevelt, however, carried through by executive action an agreement with Santo Domingo, whose substance had been rejected by the Senate when embodied in treaty form.

PRECEDENTS ESTABLISHED BY WASHINGTON

These considerations indicate that (as Jefferson, while secretary of state, advised President Washington), since the approval of the Senate must finally be secured, that body should, where not incompatible with public interests, be consulted before the opening of negotiations.[1] Washington followed this advice, and from the practice of his administrations farther light may be obtained upon the interpretation of the treaty-making clause with reference to the control of negotiation. At the outset of his first administration Washington evidently considered it desirable to secure the sanction or approval of the Senate during the stage of treaty-making pertaining to the preliminaries of negotiation. He also deemed it expedient that this approval should be secured by oral, rather than by written, communication. Therefore in 1789, less than four months after his inauguration, he appeared in the chamber of the Senate, pursuant to notice, "to advise with them on the terms of the treaty to be negotiated with the Southern Indians."[2] It will be noted that this was not a treaty which had been negotiated, and for whose ratification the President desired the advice and consent of the Senate, but was, rather, a mere project of a treaty which was still to be negotiated. In other words, the President was consulting the Senate, through personal interview, in order to secure its advice while the negotiations were still incomplete, and indeed not even begun.[3]

Washington's reasons and motives in consulting with the Senate in person in regard to treaties were stated by himself as follows:

[1] *Jefferson's Writings* (Ford ed.), V, 442. From this it follows that the Senate should also be consulted during negotiations.

[2] 1 Annals of Cong., Col. 67: 1 Executive Journal, 20.

[3] They had probably not yet begun, since the commissioners nominated by the President to negotiate the treaty had only a day or two before been confirmed by the Senate. 1 Annals of Cong., Cols. 65 and 67.

"In all matters respecting treaties, oral communications seem indispensably necessary, because in these a variety of matters are contained, all of which not only require consideration, but some may undergo much discussion, to do which by written communications would be tedious without being satisfactory." [1]

The question naturally arises why, if Washington considered oral communications so superior to written ones in consulting the Senate in treaty-making, he did not again make use of that method during his administrations, and why no subsequent President ever appeared in the Senate chamber to communicate with that body in regard to a treaty until the time of Wilson, and then only for the purpose of delivering a formal address.[2] The reason assigned is that Washington found his one experience unsatisfactory and therefore did not repeat it. But in what particular, or on what ground, he found it unsatisfactory is not usually specified.

The explanation is to be found in an incident which occurred during the President's first visit to the Senate. A written statement was read to the Senate containing a recital of facts, together with seven questions regarding the terms of the treaty on which advice and consent was asked. After two of these questions had been put, Senator Maclay of Pennsylvania moved that the matter be referred to a committee.[3] Thereupon, as Maclay records in his journal, the President started up in a violent fret, declaring "this defeats every purpose of my coming here." [4] Nevertheless the motion was carried and the matter was committed.[5] Thus on the first occasion when the question arose, the Senate chose to adopt a course of action which was suitable

[1] *Washington's Writings*, XI, 417; quoted by Foster, *Practice of Dip.*, 264.
[2] See Cong. Record, July 10, 1919. President Wilson had, however, appeared before the Senate on January 22, 1917, and delivered an address on the essential terms of peace.
[3] Maclay's *Journal*, 130.
[4] *Ibid.*, 131. Cf. J. Q. Adams, *Memoirs*, VI, 427.
[5] 1 Ex. Jour., 22, 23.

for a legislative body, but not suitable for an executive council, in which capacity the Senate was intended to act in dealing with treaties. Maclay's reason for making the motion to commit is stated by himself as follows: "Commitment will bring the matter to discussion, at least in the committee, *when he [the President] is not present.*" [1] Thus it was intended that the President should not participate in the real discussion through which the Senate should reach its conclusion, and that he should be present only when the Senate was prepared to answer his questions by categorical answers.

The Senate thus chose to proceed on the theory that in advising and consenting to the ratification of treaties it is acting in its representative capacity, rather than as an executive council.[2] It would seem that, by the adoption of this course, it largely destroyed the possibility of real consultation between it and the President in treaty matters.[3] Although the relations between the President and the Senate were closer, and probably more cordial, in this early period than they have been during most of our national history, evidences are discernible that even at that time a certain jealousy and distrust, and a determination to maintain rigidly their respective powers and prerogatives in treaty-making, were growing up between the President and the Senate. Thus, Maclay remarks, "The President wishes to tread on the necks of the Senate. . . . He wishes us to see with the eyes and hear with the ears of his secretary

[1] Maclay's *Journal*, 131. Italics are mine.

[2] For this course it may find partial justification in the fact that, under the Constitution, treaties, when proclaimed by the President, become part of the law of the land.

[3] As Woodrow Wilson many years later pointed out: "Argument and an unobstructed interchange of views upon a ground of absolute equality are essential parts of the substance of genuine consultation. The Senate, when it closes its doors, upon going into 'executive session,' closes them upon the President as much as upon the rest of the world. He cannot meet their objections to his courses except through the clogged and inadequate channels of a written message or through the friendly but unauthoritative offices of some Senator who may volunteer his active support." *Congressional Government* (Boston, 1885), 233.

only. The secretary to advance the premises, the President to draw the conclusions, and to bear down our deliberations with his personal authority and presence. Form only will be left us."[1]

FUNDAMENTAL CONDITIONS OF TREATY-MAKING

The Constitution's framers did not desire to make treaty-making unduly easy.[2] Hence they associated together two independent authorities whose concurrence must be secured before a treaty can be completed. This arrangement almost inevitably gives rise to occasional friction; and even when there is harmony between the President and a majority of the Senate, the two-thirds requirement may enable a minority to block action. These obstacles may be overcome if the political party to which the President belongs controls a large majority in the Senate. Even though this is not the case, they may be overcome at times by cautious and conciliatory action. Thus, Daniel Webster, when secretary of state, negotiated the Ashburton Treaty, and, by keeping the principal senators informed as to the various steps in the negotiation, was enabled to secure the Senate's advice and consent to ratification, even though the majority of that body was opposed to the President politically.[3]

When, as in treaty-making, the exercise of a power is entrusted to two independent authorities whose concurrence must be secured before the power can be fully brought into play, it follows that the degree of control which each authority can exercise will, within constitutional limits, depend largely upon the efficiency of the two in using their respec-

[1] Maclay's *Journal*, 131.

[2] Cf. Madison in Farrand, *Records of Federal Convention*, II, 548.

[3] J. W. Foster, "The Treaty-Making Power under the Constitution," *Yale Law Journal*, XI, 71 (Dec., 1901). A secretary of state is more likely to be proficient in conciliating the Senate if he has himself seen service in that body, and it may be that, as Reinsch points out, the fact that, of late years, our secretaries of state have not usually had previous senatorial experience, accounts for some of the difficulties encountered in treaty-making. *Am. Legislatures and Legislative Methods*, 95.

tive shares of the power; and inasmuch as such efficiency will vary from time to time, the degree of control which each will wield over the exercise of the power in question will also vary. Since, however, the working efficiency of any governmental agency is largely dependent upon the adaptability of its organization to the purpose in hand, it is possible to arrive at conclusions which will be generally true as to the respective control of the President and Senate in treaty-making.

Although, as already indicated, Washington did not again consult the Senate in person in regard to treaties, he frequently took that body into his confidence through written communications with regard to proposed or pending treaties. But in the case of the most important treaty of his administrations, the Jay Treaty with Great Britain, he does not seem to have followed this practice. After his time the custom of consulting the Senate as a body prior to laying before it the completed draft of a treaty fell into disuse, although occasional recurrences of it may be found.[1] With the admission of new states, the size of the Senate so increased that it became less and less suitable to act as an executive council, even had it desired to do so. As we have seen, the House of Representatives was excluded from participation in the treaty-making power largely because its size would render it practically impossible to secure in all cases that "secrecy and dispatch" which were considered necessary to success in treaty-making. Yet the House of Representatives had at first considerably fewer members than has the Senate at the present time. The question might, therefore, be asked whether, had the Constitution's makers known that the Senate would become as large as it now is, they would have associated it in the treaty-making power. To this question no certain

[1] Thus Presidents Jackson and Polk, in 1830 and 1846 respectively, sought the advice of the Senate on proposed treaties. Other examples are given in Crandall, *op. cit.*, 70-72. Cf. Senator Lodge in *Scribner's Magazine*, XXXI, 39-40 (Jan., 1902).

answer can be given; for considerations—perhaps even more important in the framers' minds—other than the size of the upper house caused it to be associated in the exercise of this power. Nevertheless, the size of the Senate nowadays has some influence towards making that body a deliberate as well as a deliberative institution; so that when quick action is desired, the President may feel that the public interest will be best conserved by not consulting the Senate at all.[1]

As a matter of fact, secrecy is not now considered so highly desirable as formerly, and the Senate has considered some treaties in open executive session. Even, however, when secrecy is admittedly desirable, and when a proposed treaty is considered behind closed doors, substantially accurate accounts of what takes place are frequently published. These facts have doubtless had some weight in causing Presidents to hesitate to ask the advice of the Senate pending negotiations. It is, of course, true that the President does not have to act in accordance with the advice of the Senate when asked and given, although he would hardly fail to do so except for weighty reasons. Moreover, he is likely to feel under some obligation, after having asked the Senate's advice, to wait until he receives a response before taking action which may not be in conformity with the advice given, even though such delay may prove prejudicial to the success of the negotiations. Rather than run the risk of undergoing such inconvenience, the President may refrain from requesting the Senate's advice until the signed draft of the proposed treaty is ready to be laid before that body.

[1] The dilatoriness of the Senate was illustrated when, in Dec., 1861, President Lincoln submitted the project of a treaty with Mexico. Almost three months later a resolution was adopted to the effect that "it is not advisable to negotiate a treaty that will require the United States to assume any portion of the . . . debt of Mexico." Before our minister to Mexico could be apprised of this resolution he, however, had already, in view of the important events occurring there, signed treaties which had been ratified by Mexico, but which contravened the spirit of the Senate resolution. Richardson, *Mess. and Pap. of the Presidents*, VI, 81-2. This was not an extreme case.

Thus, desirable "secrecy and dispatch" in foreign negotiations may be defeated by the size and dilatoriness of the Senate. In so far as they are clearly desirable, the President is the more efficient authority, and control of treaty negotiations therefore tends, to this extent, to gravitate into his hands. These, however, are not the only desirable conditions of the successful conduct of negotiations. Caution and circumspection in weighing the effects of a treaty, both immediate and remote, in relation to the protection of the interests of the whole country are also desirable, and from this point of view the action of the Senate may be more efficient than that of the President.

In giving its advice the Senate does not have to await a request from the President, and instances have occurred in which that body has, on its own initiative, advised the President to open negotiations.[1] Such initiative has also sometimes been taken by act of Congress.[2]

The advice given, however, need not be acted upon; for the President is completely in control of actual negotiations, in the sense of the conduct of *pourparlers* with the representatives of foreign governments.[3] The Senate has no

[1] Thus, by simple resolution of March 3, 1835, adopted in executive session, the Senate requested the President to open negotiations with Central American countries looking toward the construction of an interoceanic canal. H. C. Lodge, in *Scribner's Mag.*, XXXI, 40. Cf. the resolution of March 3, 1888, *ibid.*, p. 42, and see Bigelow, *Breaches of Anglo-American Treaties*, 73. Again, by a Sen. Jt. Res. approved Apr. 8, 1904, the President was requested to negotiate and, if possible, conclude negotiations with Great Britain for a review and revision of the rules and regulations governing the taking of fur seals in the Bering Sea. Cong. Record, vol. 38, p. 4673; House Rept. 2076, 58 C. 2 S.; 33 Stat. at L., pt. 1, p. 586. In suggesting negotiations the Senate does not usually undertake in advance to specify in detail the terms of the treaty to be drafted. But the President may consult with the Senate or with individual Senators informally regarding the details of a treaty. The Senate may also, by resolution, advise the President not to negotiate a particular treaty, or a treaty of a given character, as was done on Feb. 25, 1862; and, if the resolution were passed by more than a two-thirds vote, it would doubtless effectively stop action. Lodge, in *Scribner's Mag.*, XXXI, 37.

[2] Thus by an act approved June 28, 1902, the President was authorized to enter into treaty negotiations with the Republic of Colombia for the purpose of securing control of the Isthmian Canal Zone. 32 Stat. at L., pp. 481-2.

[3] In 1835 President Jackson vetoed an act of Congress on the ground that it was "obviously founded on the assumption that an act of Congress can give power to the Executive or to the head of one of the departments to negotiate

right to conduct diplomatic correspondence, nor is the President the mere ministerial agent of that body in conducting such correspondence. None the less, its advice may be influential in inducing the President to undertake a particular negotiation. Even the House of Representatives may, on its own initiative, advise the President to undertake negotiations.[1] Whatever weight the House of Representatives has in the negotiation of treaties is largely due to its control over appropriations necessary to pay the expenses of the negotiations. This power of the House, however, is not of as much consequence as it might seem, because special appropriations are not usually necessary. Finally, the two branches of Congress, acting as a legislative body, may attempt to exercise an influence upon the negotiation of treaties by appropriating, or by failing or refusing to appropriate, the funds necessary for the support and expenses of the commissioners appointed by the President for the purpose of conducting the negotiations.[2] If the appropria-

with a foreign government . . . the Executive has competent authority to negotiate . . . with a foreign government—an authority Congress cannot constitutionally abridge or increase.'' Richardson, *Mess. and Pap. of the Presidents*, III, 146.

[1] Thus, by a provision contained in the sundry civil bill passed Aug. 7, 1882, the sum of $20,000 was appropriated to pay the expenses of a commission to negotiate a reciprocity treaty with Mexico, which was accordingly done. House Rept. 2615, 49th Cong., 1st sess., p. 15. In the minority report of the Ways and Means Committee on the treaty as negotiated it was stated that ''The right of Congress to enact this legislation is found in the clause of the Constitution which confides to it the regulation of commerce.'' Again, the House alone has sometimes requested the President to negotiate a treaty (Hinds, *Precedents*, II, 985, 986, 988). The House also requested the President not to negotiate a treaty (*ibid.*, 988). A call by the House for papers regarding the negotiation of a treaty was complied with by President Jackson, but was not to be considered a precedent (*ibid.*, 1003). Congress, on another occasion, attempted to limit the time within which treaties should be negotiated and ratified (*ibid.*, 1001).

[2] In this connection it may be noted that by an act of March 3, 1871, Congress forbade the treaty-making agencies thereafter to deal with the Indian tribes as if they were independent nations; and the tribes have since been dealt with through domestic Executive and Legislative authority (16 Stat. at L., 566, R. S. sect. 2079). It is significant that this provision was contained in an appropriation act, which suggests that its practical enforceability rests upon the power of Congress to withhold appropriations to enforce Indian treaties. The Supreme Court had held that an Indian nation was a community with which the United States could enter into treaty relations. Worcester *v.* Georgia, 6 Pet., 515.

tion is made, the consent of Congress to the negotiations is thereby given. The negotiations might be undertaken without such consent; but the enactment of an appropriation bill gives the President the moral support of the two houses, without which he might hesitate to proceed.[1]

[For References, see p. 167.]

[1] As indicated, however, in Chapter IV, a special appropriation for the negotiation of a treaty is not usually necessary, since the President may utilize the regular diplomatic representatives, or may appoint special agents and pay them out of the contingent fund for foreign intercourse. In the case of secret agents, he may pay them on presidential receipts or certificates, without vouchers specifically accounting for such expenditure. R. S. sect. 291.

CHAPTER IX

THE TREATY-MAKING POWER: PRACTICAL OPERATION

PRESIDENTIAL attitude toward Congressional participation in treaty-making is always influenced by the exigencies of practical politics, and for this reason, if no other, it has varied greatly from period to period. Legally, the Chief Executive may ignore the Senate until the draft treaty has been negotiated; and it follows, *a fortiori,* that he may ignore the House of Representatives.[1] The latter body, however, has sometimes endeavored to take a hand in pending negotiations. Thus, in a resolution passed in 1848 the House requested President Polk to transmit to it information regarding negotiations then going forward with Mexico. The resolution failed to contain the usual clause conditioning compliance upon compatibility with the public interests, and it was a manifest attempt to withdraw from the full control of the President negotiations that were still in progress; Polk naturally declined to comply with it.[2] As far back as 1796 the House, replying to President Washington's message on the Jay Treaty declining to transmit information regarding the negotiation, disclaimed any part in

[1] Senator Spooner, an able constitutional lawyer, declared in 1906: "From the foundation of the Government it has been conceded in practice and in theory that the Constitution vests the power of negotiation and the various phases—and they are multifarious—of the conduct of our foreign relations exclusively in the President. And he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined." Cong. Record, Jan. 23, 1906, vol. 40, p. 1418. Cf. the remarks of Senator Lodge to the same effect, *ibid.,* 1470.

[2] Richardson, *Mess. and Pap. of the Presidents,* IV, 565-7. Cf. the resolution introduced into the Senate by Senator Knox on June 10, 1919, regarding the separation of the treaty of peace with Germany and the Covenant for the League of Nations. Cong. Record, 66th Cong., 1st sess., p. 935.

treaty-making. The resolution then adopted expressly excepted from the request any information whose publication would have a prejudicial effect upon pending negotiations.[1] Even so, the President, in this instance also, declined to comply. None the less, although legally the President may ignore the House, considerations of practical politics may force him to consult that body or to transmit to it information requested, in order to secure necessary appropriations.

The same considerations may also, on occasion, make it prudent for the President to take the Senate into his confidence prior to opening negotiations, by presenting to that body for confirmation, the names of the negotiators, or by submitting their instructions for approval, or in other ways. In 1792 President Washington addressed a communication to the Senate asking whether that body would advise and consent to an extension of the powers of the commissioners delegated to negotiate a treaty with Spain, and to the ratification of a treaty to be negotiated in conformity with such instructions. The Senate, by a resolution passed by a two-thirds vote, answered both inquiries in the affirmative, thus actually promising approval before the treaty was negotiated.[2] However, as we have seen, the President did not always take this course.

In 1846 James Buchanan, then secretary of state, in writing to our minister to Great Britain with reference to pending negotiations, pointed out that a rejection of the British ultimatum might lead to war, and added that, since the Senate constituted a portion of the war-making power, "the President, in deference to the Senate, and to the true theory of the constitutional responsibilities of the different branches of the Government, will forego his own opinions so far as to submit to that body any proposition which may

[1] Annals of Congress, 4th Cong., 1st sess., 759-60.
[2] *Senate Executive Journal*, I, 106, 115.

be made by the British Government."[1] If this be the true theory of constitutional responsibilities, it would seem that something might also be said in favor of consulting the House of Representatives, as the other branch of the war-making power. As we have seen, President Polk consulted the Senate in 1846 regarding pending treaty negotiations. In a message to that body he declared this practice to be "eminently wise."

"The Senate," he continued, "are a branch of the treaty-making power, and by consulting them in advance of his own action upon important measures of foreign policy which may ultimately come before them for their consideration, the President secures harmony of action between that body and himself. The Senate are, moreover, a branch of the war-making power; and it may be eminently proper for the Executive to take the opinion and advice of that body in advance upon any great question which may involve in its decision the issue of peace or war."[2]

Certainly Presidents have not always, or even usually, adopted such a conciliatory attitude toward the Senate during treaty negotiations.[3] It may, however, be not only a necessity of practical politics, but also a moral duty of the President, so far to coöperate with the other branch of the treaty-making power as to consult with the Senate, or at least to take into his confidence influential members of the foreign relations committee, during the course of important negotiations.[4] If there is thus a moral duty on the part of the President to consult the Senate, it follows that, correlatively, there is a moral right on the part of the Senate to be consulted. Some friction and lack of smoothness in the working of the treaty-making function of the Govern-

[1] *Works of Buchanan* (Moore ed.), VI, 379, quoted by Crandall, *op. cit.*, 71 n.

[2] Richardson, *Mess. and Pap. of the Presidents*, IV, 449.

[3] In the course of the debate on the Treaty of Versailles of 1919 certain senators complained that, although the President was in full control of the cables and wireless, he did not consult with them nor ask their advice during the Peace Conference. Cong. Record, November 6, 1919, p. 8485.

[4] President McKinley, as we have seen, went so far as to appoint members of the Senate on the commission to negotiate the treaty of peace with Spain.

ment is, however, almost inevitable, considering that the concurrent action of two independent branches of the Government is necessary, and especially when the President and the majority of the Senate belong to opposite political parties.[1] But friction may be largely reduced by an earnest effort on both sides to act in harmony.

TREATIES IN THE SENATE

The Senate can have no official notice as to the text of a treaty, and can secure no copy as a basis of action, except through the President. This arises from the fact that the President is the sole official organ of communication between the American and foreign governments. It follows also that the Senate cannot act officially upon a treaty, either favorably or unfavorably, unless and until the properly signed and authenticated draft has been transmitted by the President. This is true, even though the Senate should, through other channels, come into possession of an official copy of the document in question. During the early part of the first session of the sixty-sixth Congress, reports were circulated to the effect that the treaty of peace with Germany had been made public, and a document which purported to be a complete, correct, and official copy of the proposed treaty was placed in the hands of a member of the Foreign Relations Committee of the Senate by the European correspondent of one of the metropolitan dailies, who had returned with it to this country; and, on June 9, 1919, this copy was spread on the record of Congress. The treaty, however, was still under negotiation at Versailles and was not signed until June 28. Even if this had not been the case, and even if the draft which thus came into the possession of the Senate proved to be an identical copy

[1] Interesting observations upon the relations between the President and the Senate in treaty-making are made by Woodrow Wilson in his *Congressional Government* (Boston, 1885), 232, and in his *Constitutional Government in the United States* (New York, 1908), 139-140.

of that which the President subsequently transmitted, the treaty could not at that time have been before the Senate for official action in advising and consenting to its ratification. Action at this point would have been premature and undoubtedly futile, because the President could still have refused ratification. He doubtless might, however, have considered favorable action upon the unofficial copy as sufficiently indicating the Senate's consent to the ratification of the treaty, or unfavorable action as foreshadowing rejection.

When the President sends the draft of a treaty to the Senate, the question may be raised whether that body is entitled to any more information than is contained in the bare text of the document. One objection that has sometimes been voiced to the participation of the Senate in treaty-making has been that its members are unfamiliar with the course of the negotiations. This objection may be overcome, however, to some extent at least, through the transmission by the President of as full information as may, compatibly with the public interest, be disclosed. In the case of the treaty of peace with Spain, President McKinley sent to the Senate various papers, including the protocols of the conferences at Paris between the American and Spanish commissioners.[1]

Although the President should, wherever feasible, transmit to the Senate, together with the draft of a proposed treaty, such information and explanations as will enable that body to act in an intelligent manner, nevertheless it is within his discretion to determine what information shall, or shall not, be furnished. The President cannot be compelled, except perhaps in impeachment proceedings, to submit to the Senate papers in his possession relating to treaty negotiations. It may not always be compatible with the public interest (or the President may feel it not to be such) to supply the Senate with full information regarding

[1] Sen. doc. 62, pt. 2, 55th Cong., 3rd sess. (1899).

all the circumstances of a difficult negotiation; and, to this extent, the Senate may be compelled to act in partial ignorance.[1]

SENATE AMENDMENTS AND RESERVATIONS

When the text of a proposed treaty is transmitted to the Senate it is customary for that body to refer it to its Committee on Foreign Relations. The committee may fail to report the treaty back to the Senate, but ordinarily a report is made.[2] Such report may recommend (1) that the Senate advise and consent to the treaty as drafted; (2) that it refuse its consent entirely; or (3) that it consent on condition that certain amendments, reservations, or understandings be incorporated in the instrument. Since the majority party in the Senate has also a majority vote in the committee, the action of the committee is determined by that party. Although a two-thirds vote of the Senators present is required in order to give consent to ratification, as well as to postpone indefinitely, all other motions and questions upon a treaty are decided by a majority vote.[3] Hence, the majority party, even though it has only a bare majority, may attach to the resolution of ratification such proposed amendments and reservations [4] as it sees fit, and those members of the Senate who belong to the minority party (to which perchance the President may also belong),

[1] Thus, President Wilson declined to submit to the Senate along with the treaty of Versailles of 1919 the *procès-verbal* or minutes of the Peace Conference. "The reason," said the President, "we constituted that very small conference was so that we could speak with the utmost absence of restraint, and I think it would be a mistake to make use of those discussions outside." *Hearings before the Senate Committee on Foreign Relations on the Treaty of Peace with Germany*, p. 521.

[2] In the case of the German peace treaty, the Foreign Relations Committee deliberated two months before reporting the instrument back to the Senate.

[3] Senate Rule XXXVII.

[4] Amendments are distinguished from reservations in that the former involve textual changes, while the latter do not. A. H. Washburn, "Treaty Amendments and Reservations," *Cornell Law Quarterly*, V, 257 (March, 1920). Cf. Q. Wright, "Amendments and Reservations to the Treaty," *Minnesota Law Review*, III, 17 (December, 1919), and E. S. Corwin, *The Constitution and What It Means Today*, 53.

are then reduced to the necessity either of voting against the treaty or of accepting it with the amendments and reservations added by the majority, notwithstanding that these may be obnoxious to many members of the minority. If the President, through his control of the negotiations, may place the Senate in the dilemma of either accepting his treaty of peace or prolonging against its will the state of war, so, likewise, the majority members in the Senate may place the minority members in a situation where they are forced either to accept the (to them) obnoxious conditions attached by the majority to the resolution of ratification or to reject the treaty entirely.[1]

As already indicated, the negotiation of a treaty, using the term in the broad sense, may be considered as still in progress while the instrument is before the Senate for approval or rejection. This fact has sometimes been overlooked or not understood by foreign governments, who have been inclined to regard as something akin to a breach of faith the failure of the Senate to consent to the ratification of a treaty in the identical form in which it left the hands of the negotiators.[2] Governments are presumed to take reciprocal notice of the provisions of constitutions concerning the location of the treaty-making power.[3] The Senate is legally free to exercise an independent judgment in regard to the terms of a proposed treaty, and, as already indicated, it may consent to ratification without change, may reject absolutely, or may consent to ratification with amendments.[4] Speaking strictly, the Senate cannot amend a treaty. But it can propose amendments and such amendments become parts of the instrument when accepted by the President and by the foreign government concerned. When,

[1] The situation on the treaty of Versailles is an illustration. See speech of Senator Walsh of Montana, Cong. Record, March 19, 1920, vol. 59, p. 4903.

[2] *Diplomatic Hist. of the Panama Canal*, Sen. doc. 474, 63rd Cong., 2nd Sess., p. 14; *History of Amendments Proposed to the Clayton-Bulwer Treaty*, Sen. doc. 746, 61st Cong., 3rd Sess., p. 3.

[3] Secretary Gresham to the Brazilian minister, Oct. 26, 1894, Moore's *Digest of Internat. Law*, V, 361; *For. Rels. of U. S.*, 1894, p. 79

[4] Haver *v.* Yaker, 9 Wall., 32.

therefore, the Senate proposes amendments, the President, unless he elects to drop the treaty entirely (as he has sometimes done), must renew negotiations looking to the acceptance of such amendments by the foreign government. Practically, the Senate may thus participate in negotiations, although only, of course, through the voluntary agency of the President. "The Senate," declared Senator Bacon, "actively engages in the work of negotiation when it makes an amendment to a proposed treaty, which amendment is to be submitted by the President to the foreign power for its consideration and approval."[1] When the Senate advises and consents to the ratification of a treaty on condition that certain amendments be incorporated in it, and the consent of the foreign government is secured to the instrument as thus amended, the President may probably then proceed to the ratification of the treaty without resubmission, in the amended form, to the Senate.[2]

After transmission to the Senate, a treaty may be recalled by the President at any time for farther consideration,[3] and it may later be resubmitted to the Senate with changes which the foreign government has accepted or it may be dropped. The President's power of thus controlling a treaty even while it is under consideration by the Senate rests upon his ultimate right to kill it by failing to ratify it or to exchange ratifications, if he deems that course desirable. The Senate has sometimes proposed such amendments to a treaty project that the President, facing the alternative of securing

[1] "The Treaty-Making Power of the President and the Senate," *North American Review*, CLXXXII, 505. An example of this occurred in 1844, when our minister to Mexico was appointed and directed by the President to open negotiations for the purpose of obtaining the consent of the Mexican Government to the modifications introduced by the Senate into the convention signed with that government on Nov. 20, 1843. Sen. doc. 231, 56th Cong., 2d sess., vol. VIII, p. 346.

[2] Upon advice of Secretary Randolph, the Jay treaty was not resubmitted to the Senate under these circumstances. Crandall, *op. cit.*, 80-81.

[3] Thus the salmon fisheries treaty with Great Britain, after submission to the Senate, was recalled by the President on account of the protests of certain fishery interests in the State of Washington. See Cong. Record, Jan. 17, 1920, vol. 59, p. 1733.

the consent of the foreign government to the amendments or of letting the treaty drop altogether, has adopted the latter course as the lesser evil. A noteworthy illustration is the general arbitration treaties negotiated during President Roosevelt's administration. It is not necessary at this time to go into the merits of the controversy between the President and the Senate in this case. It is sufficient to point out that the difference of opinion did not directly involve the question of the desirability of international arbitration, but turned on the question whether the special agreements to be drawn up for the purpose of defining each particular matter of international controversy should be submitted to the Senate. Neither the President nor the Senate was willing to yield to the other on this point; hence the treaty was lost.

It is universally admitted that the President may withhold ratification from a treaty to which the Senate has given its advice and consent with amendments, but it has been alleged that, if the Senate advises and consents to a proposed treaty in the exact form in which it was submitted by the President, this act "concludes the transaction" and the President has no choice except to ratify.[1] This, however, is undoubtedly an erroneous view. Circumstances might arise which would make ratification inadvisable even after the Senate has approved a treaty without amendment; and the President has, as a matter of fact, under these circumstances, exercised his discretion to withhold ratification.[2]

The power to propose unacceptable amendments may be used by the Senate for the purpose of killing a treaty without incurring the possible odium of rejecting it outright. On the other hand, the power may be used to perfect a treaty or to bring it more nearly into harmony with the political traditions or the economic interests of this country

[1] Senators Brandegee and Reed, in Congressional Record, March 2, 1920, vol. 59, pp. 4032-33.

[2] See Crandall, *op. cit.*, 97, 98.

and of its various sections, on lines which may not have been fully appreciated by the Executive during the preliminary negotiations.[1] The power to propose amendments and to insert reservations or interpretations into its resolution of ratification has been used by the Senate at all periods of our history, but with increasing frequency in later decades.[2] "Of recent years," says a close observer, "the Senate has shown what amounts almost to a mania to amend treaties; and unless the President accepts the amendment, a treaty that may have been the work of months of careful and intricate negotiations is wrecked. . . . More than once I have heard Mr. Hay say that, in dealing with foreign governments, he felt as if he had one hand tied behind his back and a ball and chain about his leg, as he was always hampered by the Senate."[3] Secretary Hay was, indeed, unduly severe in his strictures upon the attitude of the Senate toward treaties. He declared that he "did not believe another important treaty would ever pass the Senate" and that "there will always be 34 per cent of the Senate on the blackguard side of every question that comes before them."[4] Senate reservations and amendments are

[1] "It was a wise provision of the Constitution," says Professor Philip M. Brown, "which placed the power to negotiate and the power to ratify in different hands. Many a time has the Senate performed a great patriotic service as well as a constitutional one in submitting treaties to a merciless examination, and in some cases to revision. An excellent example of this was the first Hay-Pauncefote treaty, which failed to reserve the right of the United States to fortify the Panama Canal. Its revision by the Senate was plainly imperative" (paper reprinted in Cong. Record, January 28, 1920, vol. 59, p. 2269). Cf. *History of Amendments Proposed to the Clayton-Bulwer Treaty*, Sen. doc. 746, 61st Cong., 3rd sess., p. 6; W. R. Thayer, *Life and Letters of John Hay*, II, 230, 273. Professor Brown, of course, falls into error in supposing that the power to negotiate and the power to ratify are placed in different hands.

[2] For collection of Senate reservations see Sen. Doc. 135, 66th Cong., 1st sess.; and see articles by C. P. Anderson in *Am. Jour. of Internat. Law*, XIII, 526-30; F. B. Kellogg, *ibid.*, 767-773; and Q. Wright in *Minnesota Law Review*, IV, 14-39 (Dec., 1919). For the reservations proposed to the German Peace Treaty, see Cong. Record, March 19, 1920, vol. 59, p. 4915.

[3] A. Maurice Low, "The Usurped Powers of the Senate," *Am. Pol. Sci. Rev.*, I, 14, 16 (Nov., 1906).

[4] W. R. Thayer, *Life and Letters of John Hay*, II, 170, 254. Hay likened a treaty entering the Senate to a "bull going into the arena; no one can say just how or when the final blow will fall—but one thing is certain—it will never

doubtless sometimes proposed and adopted, not for the purpose of perfecting the substance of the treaty, nor yet as indicating any real hostility to the main object of the instrument, but for the simple purpose of protecting the Senate against the real or fancied encroachments of the Executive. This was alleged to have been the animus, in part at least, behind the amendments proposed and adopted to the general arbitration treaties submitted to the Senate in the administrations of Presidents Roosevelt and Taft.[1]

In order that Senate amendments or reservations may be valid and binding as parts of a treaty, they must be approved by the President and must also receive the consent, express or tacit, of the foreign country.[2] In 1838 the United States made a treaty with the New York Indians.[3] But the Senate adopted a resolution which purported to change the terms. The resolution, however, was not brought to the attention of the Indian tribe, was not approved by the President, and was not published with the treaty in the President's proclamation. The Supreme Court, therefore, held that it never became operative and could not be considered as a part of the treaty.[4] Shortly after the Senate advised and consented to the ratification of the treaty of peace with Spain in 1899, it agreed to a joint resolution to the effect

leave the arena alive." *Ibid.*, 393. He was so incensed at the action of the Senate on the first Hay-Pauncefote treaty of 1900 that he tendered his resignation to President McKinley, which, however, was not accepted. *Ibid.*, 226.

[1] Similarly, some of the Senate (or Lodge) reservations to the Treaty of Versailles, while doubtless animated by a desire to protect general American interests, appear also to have been based, in part, upon a desire to place the President under Congressional supervision in various dealings with foreign nations which he would have under the treaty, if ratified. See D. J. Hill, "The Covenant or the Constitution," *North American Review*, CCXI, 329-331 (March, 1920).

[2] In the Senate resolution advising and consenting to ratification of the treaty of peace with Germany (provided two-thirds of the senators present should concur), subject to certain reservations, it was provided that "a failure on the part of the allied and associated powers to make objection to said reservations and understandings prior to the deposit of ratification by the United States shall be taken as a full and final acceptance of such reservations and understandings by said powers." Cong. Record, March 19, 1920, vol. 59, p. 4915.

[3] 7 Stat. at L., 550.

[4] New York Indians *v.* United States, 170 U. S., 1.

that it was not thereby intended to admit the inhabitants of the Philippine islands to United States citizenship or permanently to annex the islands. The Supreme Court held, however, that the meaning of the treaty of peace could not be altered or controlled by the Senate resolution.[1] On the other hand, our delegates to the Second Hague Conference endeavored to safeguard the Monroe Doctrine by declaring, before signing the convention for the pacific settlement of international disputes, that "Nothing contained in this convention shall be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions."[2] This reservation may be considered as valid, since it was incorporated both in the Senate's resolution of ratification and in the President's proclamation of the treaty, and received the tacit assent of the other signatory powers.

On the other hand, a reservation or interpretation made by the President alone, without the consent of the Senate and of the other signatory power, would not be binding; and for this reason the President usually declines to accompany a treaty with explanations which have not been authorized by the Senate in its resolution of ratification. When the Senate, however, has consented to the ratification of a treaty with certain reservations, and such reservations have been accepted by the other contracting power, the acceptance may

[1] Fourteen Diamond Rings *v.* United States, 183 U. S., 176. For the text of the Senate resolution, see Cong. Record, Feb. 14, 1899, vol. 32, p. 1846. The resolution was passed by a vote of 26 to 22, or less than two-thirds of a quorum, and was never approved by the House of Representatives or by the President. It is to be regarded as an almost contemporaneous explanation of intention, rather than as a reservation. According to Justice Brown, who concurred in the opinion of the court, it would not have altered the situation had the resolution passed the Senate by a unanimous vote.

[2] Malloy, *Treaties*, etc., p. 2247.

be acknowledged and effectuated by the President alone without consultation with the Senate.[1] It is doubtful, however, whether the President could accept, on behalf of our government, reservations attached to a treaty by the other contracting power, without securing the consent of the Senate thereto. On at least one occasion the Senate apparently took the position that an amendment or reservation made by a foreign government must be accepted, not only by the President, but also by the Senate itself, in order to be valid as a part of a treaty.[2]

OPEN EXECUTIVE SESSIONS

In the great majority of cases the Senate has considered treaties behind closed doors. But within recent years an agitation has arisen in favor of considering them in open executive session, and this has been done in a few cases, the most conspicuous instance being that of the peace treaty with Germany, including the Covenant of the League of Nations. The experience in this case, however, cannot be said to show this method to be wholly satisfactory.[3] It

[1] Thus, the Senate advised and consented to the ratification of the convention between the United States and Denmark ceding to the United States the Danish West Indies, with the proviso that the attitude of the United States in respect to the property of the Danish national church in the islands should be made the subject of an exchange of notes between the two governments. This exchange was effected by the President alone on January 3, 1917. See 39 U. S. Stat. at L., part 2, pp. 1716-7.

[2] In advising and consenting to the ratification of the General Act for the Suppression of the African Slave Trade, the Senate resolved "that the Senate advise and consent to the acceptance of the partial ratification of the said General Act on the part of the French Republic, and to the stipulations relative thereto, as set forth in the protocol signed at Brussels, January 2, 1892." Malloy, *Treaties*, etc., p. 1991. In the debate on the reservations to the German peace treaty Senator Norris said: "I should think, as a matter of law, in our Government, a very serious legal question would be involved that would really affect the validity of a treaty if the President should act and acquiesce in a reservation coming from some other country without the consent of the Senate." Cong. Record, March 19, 1920, vol. 59, p. 4889.

[3] In the debate on reservations to the German peace treaty Senator Thomas expressed his opinion of open executive sessions on treaties as follows: "If any member of this body still holds the opinion that open executive sessions are wise or even politic, I trust the spectacle which the Senate has today presented to the people of the United States will serve to disillusion him. And if anyone longer imagines that any issue submitted to this body for determina-

seemed to render compromise between the various factions in the Senate more difficult. Some persons might hold that compromise in this case was not desirable, and that in order to safeguard the public interests, the full light of publicity should be thrown on the proceedings of the Senate. There is undoubtedly force in this argument, but, where the treaty-making power is vested in two independent organs of the government, and a two-thirds vote in one of these organs is required, compromise may frequently be necessary, if the treaty-making power is to function at all satisfactorily. The experience with the German Peace Treaty would seem to indicate further that it would be desirable to amend the Constitutional provisions relating to the treaty-making power so as to require the consent merely of an absolute majority of all members of the Senate instead of a two-thirds majority of those present, in order to prevent a minority of that body from blocking action.[1]

tion, however great, will escape the contamination of a sordid and humiliating partisanship, let him read the Congressional Record and be undeceived.'' Cong. Record, March 18, 1920, vol. 59, p. 4847. Although not without some justification, this judgment is probably too severe.

[1] At the Jackson Day banquet of 1920, William J. Bryan said: ''According to the Constitution, a treaty is ratified by a two-thirds vote, but the Democratic party cannot afford to take advantage of the constitutional right of a minority to prevent ratification. A majority of Congress can declare war. Shall we make it more difficult to conclude a treaty than to enter a war?'' Address reprinted in Cong. Record, January 9, 1920, vol. 59, p. 1292. In this connection it is interesting to note that in the convention of 1787 Madison secured the temporary adoption of a provision which would have allowed treaties of peace to be made by the President and a mere majority of the Senate; while James Wilson objected to the two-thirds requirement on the ground that ''if two-thirds are necessary to make peace, the minority may perpetuate war, against the sense of the majority.'' *Documentary History of the Constitution*, III, 700, 704. A proposal that a majority of the total number of members should suffice to give the Senate's assent to treaties was defeated by the bare margin of one vote. *Ibid.*, 705.

As a result of the Senate's inability to consent to the ratification of the treaty of Versailles, a movement developed to reduce the number of senators required to vote favorably on a treaty from two-thirds to a bare majority. The arguments put forth in favor of this change are that the two-thirds rule has proved unworkable in practice and that a minority of the Senate should no longer be allowed to block action. In order to carry out this purpose, as well as to give the President a clear initiative in framing treaties, a joint resolution to amend the Constitution was introduced by Senator Owen as follows: ''The President shall have power, by and with the advice of the Senate, to frame treaties, and, with the consent of the Senate, a majority of the Senators present concurring therein, to conclude the same.'' Senate joint

PRESIDENTIAL INFLUENCE OVER SENATORIAL ACTION

To what extent may the President control the Senate with a view to securing favorable action on treaty projects? Legally, the Senate is, of course, free to act as it chooses, without regard to the President's wishes; practically, what the President desires is often a factor of considerable importance in determining its course. If the political party to which the President belongs has a considerable majority in the Senate the interests of party success and solidarity will naturally tend to bring into line in favor of the treaty senators who might otherwise adopt an unfavorable attitude. In senatorial action upon treaties, however, party considerations do not usually have as much weight as in the consideration of questions of purely domestic concern. It usually happens that when the Senate votes on treaties members of both parties are found on each side. Exceptions to this rule are most apt to occur in the case of administration treaties submitted to the Senate shortly before a Presidential election.[1]

Although the Senate has sometimes failed to consent to the ratification of treaties which seemed to have general popular approval, that body is by no means entirely lacking in sensitiveness to public opinion, and it will not ordinarily stand out against a treaty, even when submitted by a President of the opposite political party, if ratification is clearly demanded by an overwhelming public sentiment.[2] A treaty

resolution 176, 66th Congress, 2d sess., Cong. Record, March 22, 1920, vol. 59, p. 5009.

[1] Thus in 1888 the Bayard-Chamberlain treaty was defeated in the Senate by a strict party vote.

[2] But, as Woodrow Wilson has said, "The President has not the same recourse when blocked by the Senate that he has when opposed by the House [of appealing to public opinion]. . . . The Senate is not so immediately sensitive to opinion and is apt to grow, if anything, more stiff if pressure of that kind is brought to bear upon it." *Constitutional Government in the U. S.*, 139. Secretary Hay declared that "the irreparable mistake of our Constitution puts it into the power of one-third plus one of the Senate to meet with a categorical veto any treaty negotiated by the President, even though it may have the approval of nine-tenths of the nation." Thayer, *Life and Letters of John Hay*, II, 219.

initiated by a President who makes no effort to consult with the Senate during negotiations and fails to take senatorial leaders into his confidence, or one negotiated by a Secretary of State who exhibits that lack of adeptness in the political aspects of treaty-making which arises from want of Congressional experience, will naturally have harder sledding in the Senate than would otherwise have been the case. Nevertheless, even with this handicap, the President may on occasion so shape the course of events as to put considerable pressure on the Senate to consent to the ratification of a treaty, in somewhat the same way (although not to the same extent) that he may bring about conditions which practically compel Congress to declare war. The influence which the President may thus exert over the action of the Senate arises from his power largely to control the conditions of negotiation, and thereby virtually to commit the nation beforehand to the adoption of a treaty.[1]

Attempt by the President to bring pressure of this sort to bear upon the Senate has sometimes been severely criticized, and even denounced as a usurpation of power.[2] But, just as a bill containing obnoxious riders, which the President is practically compelled to sign against his better judgment or allow to become a law without his signature, is

[1] Cf. Woodrow Wilson, *Constitutional Government in the United States,* 77; *ibid., Congressional Government,* 233-4.

[2] In the course of the debate on the Treaty of Versailles in 1919 Senator La Follette said: "They [the Senate] have that power [of amendment], but the conditions then operate to deprive them of that freedom of judgment which the Constitution intended to confer upon them. . . . He [the President] has proceeded in such a manner as to render it impossible for the Senate to advise with him effectively upon the subject and also in such a manner as to compel the Senate to concur in the treaty or else leave the country still in a state of war." Cong. Record, Nov. 6, 1919, vol. 58, pp. 8482, 8489. Speaking of the same situation, Dr. David J. Hill declared: "The superior power of the President lies in the fact that he can create conditions which may embarrass the free judgment of his colleagues in exercising the treaty-making power. . . . The contention that one department of the Government may in any way coerce another is a repudiation of the very purpose of the division of power, and would result in the destruction of that freedom under law which the Constitution aims to establish. . . . Absolutism, which the Constitution was intended to prevent, might thus creep in through the usurpation of power by a single department, or even by a single officer of the Government." *Present Problems in Foreign Policy,* 162-3.

of as full legal validity as if the obnoxious conditions had not existed, so the validity of a treaty, if duly consented to by the Senate, under whatsoever conditions of practical compulsion, is not thereby affected; for full legal freedom of action on the part of the Senate remains. Doubtless the framers of the Constitution had no intention that either form of coercion should be employed. If this be so, one must simply say that constitutional theory has been modified by practice. Moreover, on account of the independent position of the Senate and the long tenure of its members, it is extremely difficult to put such pressure upon that body as practically to rob it of free judgment in treaty matters. Certainly, as the precedents amply show, the President can exert much less pressure upon the Senate in such matters than upon Congress in bringing about a declaration of war. The President "proposes but by no means disposes, even in this chief field of his power."[1]

CONCLUSIONS

In conclusion, the question may be raised whether the participation of the Senate in the treaty-making power has been, on the whole, injurious or beneficial in its effect upon the general course of our foreign relations. Participation by the Senate may be objected to on the ground that the action of that body is taken by men who, as a rule, are not wholly familiar with the preliminary negotiations, who are sometimes, perhaps, too easily swayed by considerations of party advantage, and do not rest under any adequate sense of responsibility for their action. There is undoubtedly some force in these charges. The President is primarily responsible for the conduct of our foreign relations, and if such relations become confused and involved through the failure of the Senate to consent to the ratification of a

[1] Woodrow Wilson, *Constitutional Government in the United States*, 139.

treaty, or through its attempt to remodel the instrument under the guise of attaching amendments, with the result of making it unsatisfactory both to the President and to the foreign power, the President may be made to bear blame which does not rightly rest upon his shoulders.

On the other hand, the Senate in its action upon treaties is often more strongly influenced by considerations of domestic than of foreign policy. This tendency was illustrated, to mention no more recent examples, by the rejection of the treaty of 1844 for the annexation of Texas and by the failure to act upon the Danish treaty of 1868 for the acquisition of St. Thomas. In the former case the slavery issue was involved, while in the latter the controlling impetus was hostility to the administration. Senatorial failure to act on the Danish treaty placed us in the untenable position of refusing to purchase the Danish islands, while, under the Monroe Doctrine, we would not allow the mother country to sell them to any other nation. We finally purchased them in 1916 for several times the price at which we might have secured them in 1868, had the Senate then been able to forget domestic issues and to regard the matter wholly from the standpoint of external policy. Sometimes, however, controlling domestic considerations relate to the welfare of the country rather than to party advantage, and instances have occurred in which the attitude of the Senate came to be generally recognized as more farsighted than that of the Executive. A minority of the Senate should not be allowed to block action; and it should be possible for the Senate to act by vote of a majority of all the senators elected—at all events provided that such majority represents states having more than half of the total population of the country. Aside from this change, however, our experience with the making of treaties does not clearly indicate any need of a fundamental reconstruction of the existing powers and processes.

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CHAPTER X

THE AGREEMENT-MAKING POWER

JUST as in the relations between individuals many understandings and agreements are entered into which are not embodied in formal contracts, but are nevertheless considered binding, so in the conduct of our international relations it sometimes seems both desirable and necessary to make agreements with foreign nations without the formality of submitting them to the Senate for its advice and consent.[1] In the constitutions of several foreign countries, *e.g.*, France, a distinction is made between different kinds of treaties, and only the more important ones, such as treaties of peace and commerce and those which obligate the finances of the state, are required to be submitted to the legislative branch. There is no express grant of the power of making international agreements without senatorial consent in the constitution of the United States. None the less, that instrument impliedly recognizes a distinction between a treaty and a mere compact or agreement, for it absolutely forbids the states to make the former, but permits them, with the consent of Congress, to enter into the latter.[2] Moreover, the Constitution confers upon the President diplomatic powers and makes him commander-

[1] In his recently published volume, *The Government of the United States*, Professor W. B. Munro, a writer of deservedly high standing, says: "Every form of international agreement to which the United States is a party must be submitted to the Senate" (p. 166). If this were true, the present chapter would never have been written.

[2] Art. I, Sect. 10, cl. 1 and 3. In the case of Holmes *v.* Jennison, 14 Pet., 540, at pp. 571-2, Chief Justice Taney observed that, by the Constitution, "the states are forbidden to enter into any 'agreement' or 'compact' with a foreign nation; and as the words could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word 'treaty.' They evidently mean something more,

in-chief of the army and navy; and in the exercise of these functions, he may, incidentally, enter into certain kinds of agreements with foreign states. Furthermore, the power of regulating foreign commerce, copyright privileges, and postal affairs is conferred upon Congress; and, incidental to the exercise of these powers, that body may authorize the President to make still other sorts of international agreements.

KINDS OF AGREEMENTS

From these considerations it follows that the subject naturally divides itself into two main divisions: (1) simple executive agreements, *i.e.*, those which the President makes on his own authority, and (2) agreements made by the President, or his agents, under the authority of the law-making power, and acting either through treaties or Congressional legislation. The first main class may be subdivided into those agreements which the President makes by virtue of his diplomatic powers and those which he makes by virtue of his position as commander-in-chief of the army and navy. There are cases, however, in which a given agreement may be made under both of these powers, so that the two classes tend to overlap. The second main category of agreements, *i.e.*, those authorized by law, may be subdivided according to subject matter into such groups as commercial, copyright, and postal agreements. Agreements of either of these two main kinds may ordinarily be made by the President himself. But in some instances they may be made on his behalf by the Secretary of State or the Postmaster-General, or by a military or naval commander.

An executive agreement entered into at an early period of our history under the powers of the President as com-

and were designed to make the prohibition more comprehensive. . . . The word 'agreement' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an 'agreement.' "

mander-in-chief of the navy was the Rush-Bagot agreement of 1817 between the United States and Great Britain, whereby the two powers undertook mutually to limit the extent of their naval armaments on the Great Lakes.[1] This is an example of the President's agreement-making power as commander-in-chief during time of peace. More numerous instances of this power arise, however, during time of war, and include agreements relating to the exchange of prisoners, armistices, and preliminary agreements as a basis for peace. An example of an agreement made under the authority of the President as commander-in-chief of the army was that of July 29, 1882, between the United States and Mexico providing for the reciprocal passage of troops across the border in pursuit of savage Indians.[2] The President has also assumed on several occasions to exercise

[1] Malloy, *Treaties*, etc., 628. Although the Senate subsequently advised and consented to the ratification of this agreement, and it was ratified and proclaimed by the President, it was at first a mere exchange of notes; and it does not appear that ratifications were ever exchanged. This agreement has at times given rise to some dissatisfaction on the ground that it tended to retard ship-building on the Great Lakes. Doubt was expressed in 1892 whether the convention was still in force. President Harrison referred the question to Secretary Foster, who, after reviewing the agreement's entire history, reported that it was still binding. See report, Sen. Ex. Doc. 9, 52d Cong., 2d sess. However, Mr. Foster observes: "It seems evident . . . that at no time during the negotiations or at its completion did the arrangement in question take the shape of a formal international treaty. As between the United States and Great Britain it never passed beyond the stage of an agreement by exchange of notes. . . . No exchange of ratifications took place." *Ibid.*, 13. See also address by C. H. Butler in *Proceedings of Lake Mohonk Conference on International Arbitration, 1910*, 107-112, where it is related that "so carefully has the United States adhered to this agreement that when the Chicago World's Fair wanted to have a naval vessel of the United States anchored in front of the Exposition grounds as an exhibit, our government refused to allow any vessel to go through the locks for fear it might be regarded as an infraction of the treaty. The result was that a brick and mortar battleship was built on piles in the harbor of Chicago and mounted with imitation guns." As a matter of fact, however, the agreement has not been as strictly observed as Mr. Butler's remarks might be construed to imply. See Bigelow, *Breaches of Anglo-American Treaties*, 32-4. In 1898 the American members of the Joint High Commission were instructed to secure a revision of the Rush-Bagot agreement so as to allow warships to be built on the Great Lakes, provided they were not to be used thereon. House doc. 471, 56th Cong., 1st sess. (1900).

[2] Malloy, *op cit.*, 1144. A memorandum attached to this agreement recited that "as . . . the constitution of the United States empowers the President to allow the passage without the consent of the Senate, this agreement does not require the sanction of the Senate, and will begin to take effect twenty

the power of agreeing with foreign governments to allow the passage of their troops across our territory.[1]

Executive agreements sometimes prove to be permanent arrangements, but in most cases they are intended only to serve until more regular arrangements covering substantially the same matters can be made by treaty. These temporary, or provisional, agreements are sometimes called protocols or *modi vivendi*. Thus, on February 15, 1888, a notable *modus vivendi* was entered into by the United States and Great Britain concerning American fishing rights along the coast of British North America.[2] Again, on August 12, 1898, the American secretary of state and the French ambassador at Washington, the latter acting on behalf of the government of Spain, signed a protocol of agreement embodying specifications of a basis of peace between the two governments. This instrument contained such important provisions as those whereby Spain relinquished all claim of sovereignty over Cuba and ceded to the United States the island of Porto Rico; and these provisions were subsequently incorporated in the definitive treaty of peace, whose ratification was advised and consented to by the Senate.[3] In 1901—to cite one more illustration—the United States, together with the other principal powers, signed a protocol with China, embodying terms for the settlement of the troubles growing out of the Boxer uprising, and imposing considerable obligations on the Chinese government.

AGREEMENTS UNDER CONGRESSIONAL AUTHORIZATION

In numerous instances Congress has passed acts authorizing the President to enter into international agreements

days after date.'' *Ibid.*, 1145. See also A. S. Hershey, ''Incursions into Mexico and the Doctrine of Hot Pursuit,'' *Am. Jour. Int. Law*, XIII, 557-69 (July, 1919).

[1] See Moore, *Digest of International Law*, II, 389-400, and Tucker *v.* Alexandroff, 183 U. S., 435, 459.

[2] Malloy, *Treaties*, etc., 738-9.

[3] *Ibid.*, 1688, 1691.

not requiring submission to the Senate; and under this authority he has made many agreements relating to trade marks, copyrights, reciprocal commercial privileges, the acquisition of territory, and other matters.[1] Since 1871 the Indian tribes have been dealt with, not through treaties, but through executive agreements which have been presented to Congress for approval.[2] From an early period, postal agreements have been made with foreign countries, and under an act of 1872[3] the Postmaster-General is authorized, by and with the advice and consent of the President, to negotiate and conclude postal treaties or conventions. Under this authorization, several such conventions have been entered into. Despite the language of the act, these conventions cannot properly be called treaties. Executive agreements authorized by prior acts of Congress may be considered as agreements made with the advice and consent of Congress, instead of the Senate, the advice and consent in this case being given before, instead of after, the agreement is made, and by a mere majority instead of a two-thirds vote. In making agreements authorized by acts of Congress, the President may be considered as exercising his constitutional power of taking care that the laws are faithfully executed.[4]

The legality of agreements entered into by the Executive under the authority of certain acts of Congress has been upheld by the Supreme Court. Thus the McKinley tariff act of October 1, 1890, authorized the President to exercise powers, under certain conditions, which resulted in the making of reciprocal tariff agreements with other countries, and to suspend, by proclamation, the free introduction into this country of certain articles from countries imposing

[1] For a detailed account of these agreements, see Crandall, *Treaties, Their Making and Enforcement* (2d ed.), chap. IX.

[2] Crandall, *op. cit.*, 134.

[3] U. S. Revised Statutes, sect. 398. Such postal agreements have been held valid by the Attorney-General in spite of the constitutional provision relating to treaties. 19 Op. U. S. Atty.-Gen., 513.

[4] Constitution, Art. II, Sect. 3.

unequal duties upon the importation of the products of the United States. The court upheld the constitutionality of the act, remarking that the measure "is not liable to the objection that it transfers legislative and treaty-making power to the President." [1] With reference to a commercial agreement with France made by the executive under the authority of the Dingley tariff act of 1897, the Supreme Court declared that, while such agreement "was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations, and made in the name and on behalf of the contracting countries and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact was a treaty under the circuit court of appeals act." [2]

In nature and importance of subject-matter, executive agreements cannot always be distinguished from regular treaties.[3] This was illustrated in connection with the controversy which arose between President Roosevelt and the Senate in 1905 regarding the arrangement with Santo Domingo whereby the United States took over the collection

[1] Field *v.* Clark, 143 U. S., 649.

[2] Altman *v.* U. S., 224 U. S., 583 (1912). On this case see editorial note in *Am. Jour. Internat. Law*, VI, 716-19 (July, 1912), where it is pointed out that if Congress can authorize the President to make reciprocal tariff agreements without submission to the Senate a general treaty of arbitration might authorize the President to make special executive agreements in particular cases. See also C. H. Butler, "The Relations of Congress to General Arbitration," *Proceedings of Lake Mohonk Conference on International Arbitration*, 1912, pp. 202-4.

[3] "It may be proper to observe," says Secretary Foster, "that the resort of an exchange of diplomatic notes has often sufficed, without any further formality of ratification or exchange of ratifications, or even of proclamation, to effect purposes more usually accomplished by the more complex machinery of treaties." Report on the Rush-Bagot Agreement, December, 1892, Sen. Ex. Doc. 9, 52d Cong., 2d sess., p. 13. This is not equivalent to saying that the nature of the subject matter of treaties and of executive agreements may be entirely identical, but merely that the same or similar purposes may be effected by the two methods.

of the custom duties of that island. The President, being unable to secure the Senate's approval of a treaty effecting this arrangement, nevertheless carried out the plan by means of simple agreement. Not until two years later did the Senate consent to the ratification of a treaty embodying substantially the same terms as the agreement. Similarly, the Nicaraguan convention of 1911 failed to receive Senatorial approval, but, under an executive agreement similar to that of 1905 with Santo Domingo, the objects of the convention were substantially attained.[1] In these cases, as in some others, failure to secure the Senate's approval did not tie the President's hands; certainly it did not prevent him from carrying out the foreign policy upon which he was bent.[2]

AGREEMENTS UNDER TREATY AUTHORIZATION

In some instances the President, in the exercise of administrative power, enters into particular agreements without the consent of the Senate, but in accordance with the provisions of general treaties which have previously received the advice and consent of that body. Thus numerous extradition treaties have been approved by the Senate, enumerating the extraditable offenses; but each particular case of the surrender of a fugitive from justice involves a special international agreement entered into by the Executive alone. As Chief Justice Taney pointed out in an early case: "From the nature of the transaction the act of delivery [of the fugitive] necessarily implies a mutual agreement."[3] It has never been considered necessary that such an agreement receive the consent of the Senate. Nevertheless, in other instances of a similar kind the Senate has shown a disinclination to allow the President a free hand in making special agreements. Thus in the case of a pro-

[1] Ogg, *National Progress*, 257.
[2] Cf. Reinsch, *American Legislatures and Legislative Methods*, 102-4.
[3] Holmes *v.* Jennison *et al.*, 14 Pet., 540.

posed arbitration treaty with Great Britain, presented for approval in 1897, the Senate proposed to amend by requiring that any agreement to submit a difference to arbitration under the treaty should "be communicated by the President of the United States to the Senate with his approval, and be concurred in by two-thirds of the Senators present." [1]

A convention adopted at the Hague Conference of 1899 established a permanent court of arbitration and reserved to the signatory powers the right of concluding general or particular agreements extending obligatory arbitration to cases in which they might deem it to be applicable. In pursuance of this provision, Secretary Hay negotiated several general arbitration treaties providing for submission to the permanent Hague court of certain differences between the contracting parties which were found difficult or impossible to settle by diplomacy. These treaties also provided that in each case, before appealing to the Hague court, the contracting parties should conclude a *compromis,* or special agreement, defining the matter in dispute and the powers of the arbitrators. When these Hay treaties were laid before it, the Senate substituted the word "treaty" for the word "agreement," in order to make certain that it would always be consulted. Dissatisfied with the treaties as thus amended, President Roosevelt declined to carry the project farther. Profiting by this experience, Secretary Root negotiated, in 1908, several general arbitration treaties which reserved to the Senate the right to advise and consent to all special agreements made under such treaties; [2] and the Senate promptly consented to their ratification.

In 1911 a controversy arose between President Taft and the Senate over a new group of general arbitration treaties. Following the Root treaties of 1908, these instruments pro-

[1] Senate Executive Journal, May 5, 1897, reprinted in Senate document 26, 66th Cong., 1st sess., p. 278. This treaty, after being amended, failed to receive the necessary two-thirds vote in the Senate.

[2] See Malloy, *Treaties,* etc., 814.

vided that special agreements made under them should in all cases be submitted to the Senate for its advice and consent. They also provided, however, that, in the event of disagreement as to whether the matter in controversy was subject to arbitration, the question should be submitted for decision to a joint commission of inquiry. To this provision the Senate objected on the ground that it encroached upon that body's constitutional treaty-making power. Consent to ratification was withheld, and the treaties consequently never became operative.

In the cases of the Hay and Taft arbitration treaties, the Senate succeeded in preventing what it deemed to be encroachments upon its constitutional treaty-making power. That body's contention, nevertheless, that a grant of its consent to the ratification of the treaties would have been an unconstitutional delegation of the treaty-making power is hardly borne out by previous and subsequent constitutional practice.[1] The Senate itself has even taken the initiative in inserting in a treaty a provision authorizing the President to enter into a mere executive agreement through exchange of notes.[2] The error of the Senate's view arises from the mistaken supposition that the President, in making special agreements, is acting specifically

[1] Cf. Fong Yue Ting *v.* U. S., 149 U. S., 698, at p. 714, where the court said: "It is no new thing for the law-making power, acting either through treaties made by the President and the Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit."

[2] Thus the Senate consented to ratification of the treaty of 1916 whereby Denmark ceded the Danish West Indies to the United States, on the understanding that the United States did not assume any responsibility with respect to the property of the Danish national church in the islands and that this matter would be made the subject of an exchange of notes between the two governments. Such exchange of notes took place on January 3, 1917. 39 Stat. at L., pt. 2, pp. 1716-17. Furthermore, Art. 8 of the Haytian treaty of Sept. 16, 1915, provided that Hayti shall not increase its public debt except by previous agreement with the President of the United States. This "phraseology is no doubt due to the desire to remove any question that such an agreement can be made by the President as an executive act as distinct from an agreement by the Government of the United States requiring the advice and consent of the Senate." *Am. Jour. Internat. Law*, X, 863 (Oct., 1916).

in pursuance of his constitutional power to negotiate treaties. If this were true, all such agreements would require the consent of the Senate. In reality, however, the President, in making such agreements, is acting under his general power of conducting the foreign relations of the nation; in the exercise of this proper power it frequently becomes necessary for him to enter into international agreements of various degrees of formality or informality. Moreover, as the Senate minority report on the Taft arbitration treaties of 1911 pointed out, the power to decide whether a particular dispute was or was not justiciable as defined by the treaty was not a delegation of treaty power, but a delegation of judicial power "to find whether the particular case is one that the President and Senate have said shall be arbitrated." It was, therefore, a delegation of the power to determine a question of law or of fact and not of policy.[1]

SIMPLE EXECUTIVE AGREEMENTS

Even though the Senate may sometimes check the President in making special agreements, in cases in which such agreements rest upon authorization contained in general treaties, the power of the President in general is thereby curtailed to a comparatively slight extent; for many international agreements entered into by the President or the Secretary of State rest upon the former's general power to adjust disputes which are incidental to the conduct of foreign relations, and may consequently be entered into without either the prior authorization or the subsequent approval of the Senate. Some of these may be mere "gentlemen's agreements," and they are not necessarily reduced to writing;[2] others may be effected by an exchange

[1] Sen. doc. 98, 62d Cong., 1st sess., p. 9.

[2] Cf. the statement of President Wilson at the White House conference with the Senate Committee on Foreign Relations: "It [the cable convention] was not a formally signed protocol, but we had a prolonged and interesting discussion on the subject and nobody has any doubt as to what was agreed upon." *Hearings on the Treaty of Peace with Germany*, 506.

of notes in identical form, and may have important consequences, as, for example, the agreements of 1899 and 1900 concerning the "Open-Door" policy in China, and the Root-Takahira Agreement of 1908 and the Lansing-Ishii Agreement of 1917, which undertook to define our attitude toward current questions in the Far East. Moreover, despite the defeat of the general arbitration treaties, the President, by virtue of his diplomatic powers, is able to refer to arbitration international disputes which he finds himself unable to settle through ordinary diplomatic negotiations. The President has entered into numerous agreements for the settlement of pecuniary claims, sometimes under the authorization of treaty provision, but frequently by mere executive agreement, without special authorization.[1] As a rule, such executive agreements involve the settlement of pecuniary claims against foreign governments,[2] and no attempt is made to settle, by such means, pecuniary claims against the United States, which might involve the appropriation of funds by Congress. The correct attitude in this matter was illustrated by President Wilson in a memorandum attached to his agreement of May, 1919, with Premier Lloyd-George of Great Britain regarding the disposition of the former German ships. "I deem it my duty," said the President, "to state, in signing this document, that, while I feel confident that the Congress of the United States will make the disposal of the funds mentioned [in the agreement], I have no authority to bind it to that action, but must depend upon its taking the same view of the matter that is taken by the joint signatories of this agreement."[3]

Although a simple executive agreement cannot, at least from the constitutional point of view, bind the Government

[1] Cf. Reinsch, *Am. Legis. and Legis. Methods*, 102.

[2] Thus in 1903 the claims of American citizens against Venezuela were submitted by the President to the Hague Court under an agreement which was not laid before the Senate.

[3] Cong. Record, vol. 59, p. 3429, Feb. 21, 1920.

of the United States to the payment of money, the President may enter into an agreement whose execution is absolutely conditioned on an appropriation by Congress. Thus in 1896 an agreement was arrived at by the Secretary of State and the British Ambassador at Washington regarding the expulsion from the United States to Canada of the refugee Canadian Cree Indians,[1] and shortly thereafter Congress passed an appropriation to carry the agreement into effect.[2] Ordinary prudence, however, would suggest that such an agreement should seldom be made except with the distinct understanding that execution is dependent upon Congressional action, or, better, except when Congress has authorized the agreement either directly or indirectly, or has in some way evidenced its willingness to make the necessary appropriation. Thus in 1850, by a simple executive agreement, Horse-shoe Reef in Lake Erie was ceded to the United States by Great Britain on the condition that the United States should erect and maintain a lighthouse thereon.[3] Congress had in the previous year made an appropriation for this purpose, and this appropriation was renewed in the following year and again in 1854, and the lighthouse was finally erected in 1856. Such subsequent appropriation act, or any Congressional enforcement legislation, is equivalent to Congressional sanction of the agreement. By analogy, it may be noted that the Supreme Court has held that under the provision of the Constitution requiring Congressional consent to compacts between states such consent may be given subsequent to the making of the compact.[4] Again, under the Platt amendment of 1901,[5] providing for the sale or lease by Cuba to the United States of lands necessary for coaling or naval stations, the President made an agreement with Cuba, without submission to

[1] Senate Rept. 821, 54 Cong., 1st sess.
[2] U. S. Stat. at L., vol. 29, p. 117.
[3] Malloy, *Treaties*, etc., 663.
[4] Virginia *v.* Tennessee, 148 U. S., 503, pp. 521-22.
[5] 31 Stat. at L., 897.

the Senate, providing for the payment to that republic of an annual sum of money for the use of the land so leased.[1]

By the terms of the Constitution, treaties made under the authority of the United States are a part of the supreme law of the land. This, however, is not ordinarily true of a simple executive agreement which is not made under the authority of a previous treaty or act of Congress.[2] When, however, the President enters into an agreement which is authorized by such prior treaty or Congressional act, the agreement has the force of law equally with the prior treaty or act. Thus the Supreme Court has held that a section of the regulations, or protocol, attached to the international postal treaty of Berne (1874) is a part of the law of the land.[3]

CONCLUSION

Frequent resort to executive agreements is undoubtedly open to objection. In contrast with treaties, such agreements may be entered into secretly; and the dictates of practical expediency may sometimes afford a plausible excuse for maintaining secrecy where a more far-sighted policy would avoid it. As a rule, international agreements,

[1] Malloy, *Treaties*, etc., 360.

[2] Secretary Knox expressed the opinion that an exchange of notes setting forth an understanding as to the meaning of a treaty "would not, so far as the internal affairs of this Government are concerned, have the status either of a treaty or of a law, but would be merely an executive interpretation of the treaty and of the Federal Statutes. This would not be binding upon the courts of this country, which might at any time disregard the agreement incorporated in the notes, in which case it would not be possible for the [State] Department to control their decision." *For. Rels. of U. S.*, 1910, p. 732. With this statement, compare the following colloquy which took place during the testimony of ex-Secretary Lansing before the Senate Committee on Foreign Relations at the hearings on the treaty of peace with Germany:

"Senator Brandegee. Has the so-called Lansing-Ishii agreement any binding force on this country?

"Secretary Lansing. No.

"Senator Brandegee. It is simply a declaration of your policy, or the policy of this Government, as long as the President and the State Department want to continue that policy, I suppose?

"Secretary Lansing. Exactly, in the same way that the Root-Takahira agreement is." *Hearings*, 219.

[3] Cotzhausen *v.* Nazro, 107 U. S., 215.

as well as treaties, should be entered into only in such a way that the salutary influence of public opinion can be brought to bear upon them; the country should not, as a rule, be bound by the stipulations of executive agreements without its knowledge and without opportunity to protest.[1] Sometimes information regarding proposed agreements is intentionally permitted to leak out during the course of negotiations in order to sound public opinion upon the project. Frequently, however, it is deemed impracticable to make the agreement public until after it has been concluded. Congress, or one of its branches, may pass resolutions asking for information concerning a rumored executive agreement.[2] Such resolutions, although usually requesting the information only "if not incompatible with the public interest," are, indeed, sometimes passed for partisan reasons, with a view to embarrassing the administration. On the other hand, they may be adopted in entire good faith, and may serve a distinctly useful purpose.

As we have seen, it is not always easy to distinguish treaties and executive agreements with reference to their subject-matter, so that these two forms of international agreement may, on occasion, constitute alternative modes of arriving at the same object. A President or Secretary of State seldom wishes to run the gauntlet of the Senate unless necessary; he is likely to have found by experience that consulting the upper house jeopardizes the success of the project, and he may consequently be minded to rely as largely as possible upon executive agreements in lieu of

[1] A resolution was passed by the House of Representatives in 1900 directing the secretary of state to inform the House "what truth there is in the charge that a secret alliance exists between the Republic of the United States and the Empire of Great Britain." Secretary Hay's answer, transmitted by the President, declared that there was no truth in the charge that such a secret alliance existed, and added that "no form of secret alliance is possible under the Constitution of the United States, inasmuch as treaties require the advice and consent of the Senate, and, finally, that no secret alliance, convention, arrangement or understanding exists between the United States and any other nation." House doc. 458, 56th Cong., 1st sess., p. 2.

[2] For examples of such Congressional requests, see House rept. 2909, 57th Cong., 2nd sess. and Cong Record, vol. 59, p. 3071, Feb. 14, 1920.

treaties. If, however, any large part of our important international understandings comes to be embodied in executive agreements, the provision of the Constitution requiring the submission of treaties to the Senate will, from the standpoint of its general intent, be rendered largely nugatory. Admitting the highest degree of wisdom and patriotism that can be claimed for our Presidents and secretaries of state, it may still be said that some executive agreements that have been entered into would probably have been improved by the searching examination of their bearings and implications which they would have received if they had been submitted to the Senate.

Despite these objections, however, the usefulness and practical necessity of executive agreements as incidental aids to the conduct of diplomatic business is apparent. Many occasions arise in the course of our foreign relations upon which difficulties of a delicate nature may be more efficiently handled by the President through executive agreements than by the treaty-making body. To require that all international understandings be submitted to the Senate would be burdensome and impracticable. It would not be feasible to conduct our foreign relations with any degree of efficiency under such a rule.

In the absence of express constitutional limitation, the United States, in the conduct of its international relations, may be regarded as endowed with all powers ordinarily exercised by other sovereign and independent members of the family of nations in carrying on foreign intercourse.[1] As was pointed out in 1870 by the territorial court of Washington, speaking of a convention entered into between the United States and Great Britain concerning the boundary line between their respective possessions: "Such conven-

[1] Cf. the view of some writers that the treaty-making power of the United States is not only derived from the Constitution but is possessed "as an attribute of sovereignty." C. H. Butler, *The Treaty-Making Power of the United States*, I, 5. This view, however, is distinct from that above stated and is not accepted by the present writer.

tions are not treaties within the meaning of the Constitution, and, as treaties, supreme law of the land, conclusive on the courts, but they are provisional arrangements, rendered necessary by national differences involving the faith of the nation and entitled to the respect of the courts. The power to make and enforce such a temporary convention respecting its own territory is a necessary incident to every national government, and inheres where the executive power is vested."[1] In most cases, however, it is not necessary to appeal to the position of the United States as a nation among nations in order to justify the President's practice of entering into international agreements without the consent of the Senate. As a rule, ample ground may be found in his constitutional powers of conducting foreign relations, acting as commander-in-chief of the army and navy, and seeing that the laws are faithfully executed.

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[1] Watts *v.* U. S., 1 Wash. Terr., 288.

CHAPTER XI

THE ENFORCEMENT OF TREATIES

FROM one point of view, the enforcement of treaties is largely an internal or municipal function and, for the most part, does not bear primarily upon our foreign relations. Nevertheless, the rights of aliens may be involved; and nonenforcement may give rise to increased activity in foreign relations through reclamations against our Government on the part of the foreign nation with which a given treaty was made. Furthermore, the execution of some treaty provisions involves direct contact with foreign governments. Altogether, the subject is so closely connected with the general conduct of our foreign relations that it may properly be given some consideration.

On the basis of the method of enforcement, the provisions of treaties to which the United States is a party fall into two groups. To the first group belong those provisions which are self-executing, in the sense that they do not require auxiliary legislation for their enforcement. They not only embody an international obligation but also constitute a part of the law of the land, and can be carried into execution by the action of the judicial authorities, just as any other law is enforced. Frequently they relate to the rights of aliens, which they undertake presently to establish, and not merely to promise for the future.

The second group of treaty provisions consists of those which contemplate executive enforcement or require auxiliary legislation before they can be effectuated. Until such legislation is enacted, the courts ordinarily decline to participate in enforcement, on the ground that the questions

involved are political rather than justiciable. These provisions embody an international compact whereby international obligations are incurred, but do not immediately constitute parts of the law of the land. The distinction between these two kinds of treaty provisions, with reference to their enforcement, was recognized by the Supreme Court in an early case, as follows: A treaty "is to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."[1]

JUDICIAL ENFORCEMENT

As previously indicated, in most cases in which a treaty is self-executing the private rights of aliens are presently established by the instrument's provisions. It occasionally happens that such provisions are strengthened by Congressional legislation, especially when it is thought desirable to provide penalties for violation of treaty rights. But if the treaty provisions are of such a character as to be self-

[1] Foster *v.* Neilson, 2 Pet., 314 (1829). See also *In re* Cooper, 143 U. S., 472, where the court declared that a treaty "is a law of the land, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined"; and United States *v.* De la Maza Arredondo, 6 Pet., 691, where the court observed that a treaty "is, in its nature, a contract between two nations and the legislature must execute the contract before it can become a rule for the court." An illustration of the latter principle is found in the tenth article of the treaty of 1828 with Prussia, giving Prussian consuls the assistance of local authorities in settling differences between the captain and crew of Prussian vessels. (Malloy, *op. cit.*, 1499). In a case of this sort which arose in 1845 Judge Story, federal district judge for the state of Massachusetts, held that the courts and magistrates of the United States were not empowered to carry into effect this provision of the treaty in the absence of a law of Congress conferring the jurisdiction upon them. James Buchanan, as secretary of state, consequently recommended that such Congressional legislation be passed. For the correspondence in the case, see House rept. 422, 29th Cong., 1st sess.

operative, ancillary legislation of Congress is really unnecessary, and the court takes the treaty as the rule of law governing it in the decision of the case. Thus in the Head Money Cases the Supreme Court said: "But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute."[1] For example, a title to land may be granted to individuals by a treaty, "without any act of Congress or any patent from the executive authority of the United States."[2] As was declared by the Supreme Court in the case just cited, "The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself."[3] Speaking generally, when the court takes a treaty as the rule for its guidance and enforces it without auxiliary Congressional legislation, it may be assumed that the treaty relates to matters not embraced among the subjects upon which the Constitution specifically authorizes Congress to exercise legislative power.

[1] Edye *v.* Robertson (Head Money Cases), 112 U. S., 580. See also United States *v.* Schooner Peggy, 1 Cranch, 103, where the court said: "Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress."

[2] Jones *v.* Meehan, 175 U. S., 1, at p. 10.

[3] *Ibid.*, at p. 32. For other cases in which the Supreme Court, without any auxiliary Congressional legislation, enforced private rights of aliens derived from treaties, see Chirac *v.* Chirac, 2 Wh., 259, and Hauenstein *v.* Lynham, 100 U. S., 483.

Under the provisions of the Constitution granting to Congress the power to establish inferior federal courts and to regulate the appellate jurisdiction of the Supreme Court [1] it becomes necessary to provide for the handling by the federal courts of cases relating to the construction of treaties. Except in so far as conferred by the Constitution, the federal courts have no jurisdiction in cases involving the construction and enforcement of treaties, at least in criminal cases, until Congress by act grants the requisite authority.[2] The first grant of this kind was made by the Judiciary Act of 1789, which, in substance, is now embodied in the Judicial Code. Under it, the Supreme Court has jurisdiction by way of appeal or writ of error from the decisions of the federal district courts and from those of the highest court of any state, in cases in which the validity or construction of a treaty of the United States is brought in question.[3] The federal district courts are given jurisdiction in civil cases at law or equity arising under treaties made by the United States when the amount in controversy exceeds three thousand dollars, and also in suits brought by an alien for a tort only, in violation of a treaty of the United States, without limitation as to amount.[4] The Supreme Court and the federal district courts are also authorized to issue writs of habeas corpus for the benefit of prisoners held in custody in violation of a treaty of the United States.[5] In addition to the regular federal courts, Congress has sometimes created special tribunals for enforcing treaty provisions in relation to claims. An example is the Spanish Treaty Claims Commission, established for the purpose of hearing cases arising under Article VII of the treaty of peace with Spain.[6]

[1] Art. III, sects. 1 and 2.
[2] Cf. U. S. *v.* Hudson, 7 Cranch, 32.
[3] Judicial Code of the U. S., sects. 237, 238; 36 Stat. at L., 1156, 1157.
[4] Judicial Code, sect. 24, pars. 1 and 17; 36 Stat. at L., 1091, 1093.
[5] Revised Statutes, sects. 751, 753.
[6] 31 Stat. at L., 877. On the working of the provision of this act giving the Supreme Court jurisdiction to consider and decide cases certified to it by

Although there has been some difference of opinion on the matter, it is fairly well settled that Congress could also confer upon the federal courts jurisdiction to punish by indictment violations of treaty rights of aliens. This, however, has never yet been done.[1] Under the Revised Statutes [2] the federal courts already have power to punish as crimes attempts to injure "citizens" in the enjoyment of rights derived from the Constitution or laws of the United States. By changing the word "citizen" to "person," it is thought that the law could be broadened so as to cover aliens.[3] The Supreme Court has declared: "That the United States have power to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities or exemptions

the Commission when the latter body is in doubt, see House rept. 313, 57th Cong., 1st sess., and Senate rept. 4329, 59th Cong., 1st sess. See also Frevall *v.* Bache, 14 Pet., 95.

[1] As to crimes specified in treaties, it is necessary for Congress to pass enforcement legislation before the courts can take cognizance of them. See *The Bello Corrunes,* 6 Wheat., 152.

[2] Sect. 5508.

[3] See "Report of Committee on the Protection by the United States of the Rights of Aliens," *Proceedings of Lake Mohonk Conference on International Arbitration,* 1911, pp. 189-195. Cf. on this subject the recommendations for legislation made by Presidents Harrison, McKinley, Roosevelt, and Taft. Richardson, *Messages and Papers of Presidents,* IX, 183, Supp. 1899-1902, pp. 69-70, 128; *For. Rels. of U. S.,* 1906, pt. 1, p. XLIII; Address of President Taft before the American Bar Assn., 1914, *Reports,* XXXIX, 362. A committee of the American Bar Association appointed to consider the question reported that "there are grave doubts as to the constitutionality" of the proposed legislation. *Reports of the American Bar Assn.,* XV, 416-21 (1892). This report was not adopted by the Association, and at least one member of this committee, Everett P. Wheeler, subsequently changed his mind. See his paper on "The Treaty-Making Power of the Government of the United States" in *Report of the 24th Conference of the International Law Assn.,* 1907, pp. 148, 157. For the diplomatic correspondence relating to the killing of Italians in New Orleans in 1891, see *For. Rels. of the U. S.,* 1891, pp. 658-728, and for a similar case occurring in 1896, see House Doc. 37, and Sen. Doc. 104, both of 55th Cong., 1st sess. Probably the best treatment of the whole matter is found in ex-President Taft's *The United States and Peace,* 40-89, where the distinguished author maintains that there is no doubt of the power of Congress to pass the necessary legislation to punish the violators of the treaty rights of aliens, granted to it by Art. I, sect. 8, clause 18, of the Constitution. On the analogy of the Siebold and Debs cases, he also argues that a statute should be passed by Congress enabling the President to act directly, without reference to state action, in protection of the treaty rights of aliens whenever they are threatened. He adds that such executive power would doubtless be implied if federal court jurisdiction were given, but that it would be better to make it express (p. 86).

guaranteed to them by the treaty [of 1880], we do not doubt.'' [1]

Under the constitutional and statutory provisions cited, the courts of the United States are competent, without any special Congressional or executive action, to hear and determine civil cases in which aliens residing in this country allege that their treaty rights are violated. When, for example, certain Italian laborers were called on in Iowa to pay a road tax in violation, it was alleged, of the treaty of 1871 between Italy and the United States, the Italian minister protested, and our secretary of state replied that ''the question was one primarily for the consideration of the judicial tribunals; that, under the Constitution of the United States, treaties were a part of the supreme law and were enforceable by the courts, and that this principle was especially applicable where complaint was made that a state law was in conflict with the treaty; that the authorities of Iowa had taken the view that such a conflict did not exist, and had administered the law accordingly; that in such case provision had been made by law for a review of the matter by the federal tribunals, and that it was competent for any Italian subject who felt aggrieved by the tax in question 'to apply to the courts of the United States, in which, and not in the executive, our Constitution and laws have lodged the requisite authority for entertaining his suit for relief against the action of which he complains.' '' [2]

[1] Baldwin *v.* Franks, 120 U. S., 678. A convincing argument in favor of this legislation is contained in the Report of the Senate Committee on Foreign Relations made in 1900 on ''Violations of Treaty Rights of Aliens,'' Sen. rept. 392, 56th Cong., 1st sess., where it is pointed out that such legislation would not oust the state courts from jurisdiction in such cases, but would supply a concurrent means of trying such cases in the federal courts according to State laws and penalties. ''That Congress has the constitutional power so to legislate,'' the Committee held, ''is not open to question'' (p. 4). See also a memorandum on the subject prepared by the Solicitor of the Department of State, House rept. 1056, 60th Cong., 1st sess. (1908), and *Proceedings of Am. Soc. of Internat. Law,* II, 21-67, particularly the Paper of Robert Lansing, pp. 44-60, showing the inconsistent attitude of our government in asserting the responsibility of foreign governments in cases similar to those in which it disclaims responsibility on its own part.

[2] Moore, *Digest of International Law,* V, 238. A similar response was made in 1890 by Secretary Blaine to the Chinese protest against a residential segre-

THE COURTS AND POLITICAL QUESTIONS

On the other hand, when political questions are involved, such as treaty provisions relating to boundaries, the courts defer to the action of the political departments of the Government. A question relating to the enforcement or non-enforcement of a treaty considered as an international contract may give rise to reclamations by one contracting party upon the other. "Whether the complaining nation has just cause of complaint is not matter for judicial cognizance."[1] Thus, treaties of alliance and treaties requiring legislative action, such as an appropriation of money or a declaration of war, are not appropriate for judicial enforcement. Furthermore, as has been pointed out, "the protection and enforcement of many rights secured by treaties most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief."[2] The courts would not interfere, by way of either mandamus or injunction, to compel or restrain the payment of money by our Government under a treaty; for this is a matter within the discretion of the political departments. The courts will usually take jurisdiction in cases arising under treaties when private rights are involved, but in arriving at decisions touching political questions they will hold themselves bound by the determinations of the political departments of the government. The courts have no treaty-making power,[3] and when a question arises as to whether a treaty of the United States was ratified on behalf

gation ordinance of San Francisco (*ibid.*, 239). Again, when a controversy arose between the United States and Japan over the San Francisco school ordinance of 1906 which was alleged to conflict with our treaty of 1894 with that country our Government promptly took appropriate legal proceedings by filing a bill of equity in the federal court in California to enforce the treaty. E. Root, in *Am. Jour. of Internat. Law*, I, 274-7.

[1] Whitney *v.* Robertson, 124 U. S., 190.

[2] Thompson, J., in Cherokee Nation v. Georgia, 5 Pet., 1, quoted with approval by Nelson, J., in Georgia *v.* Stanton, 6 Wall., 50.

[3] *The Amiable Isabella*, 6 Wheat., 1, at p. 71.

of the foreign nation by the proper authority, or was made with a sovereign power capable of entering into treaty relations with the United States, the courts will conform their decisions to the determination of these questions made by the political departments of the Government.[1] In the Charlton extradition case, the question arose whether the treaty with Italy was to be construed as having lapsed through its breach by that country. But the court held the instrument to be in full force, because our own Executive still recognized an obligation of the United States under it to surrender its own citizens.[2]

In the case of treaty provisions enforceable by the courts as primary law of the land, without auxiliary legislation, it may happen that there are already laws on the statute-books which are in conflict with the provisions of the later treaty. These may be acts either of Congress or of the state legislatures, which are otherwise valid; and the question arises whether the treaty overrides them. The Supreme Court has declared it to be clear that "the treaty power of the United States extends to all proper subjects of negotiation between our Government and the governments of other nations."[3] If within such limits, and not in conflict with the Constitution,[4] a treaty overrides any

[1] Doe *v.* Braden, 16 How., 635.

[2] Charlton *v.* Kelly, 229 U. S., 447. Cf. Terlinden *v.* Ames, 184 U. S., 270, where the court held that the existence of the treaty of June 16, 1852, between the United States and Prussia, notwithstanding the incorporation of Prussia into the German Empire, had been repeatedly recognized by the political department of the Government and could not be questioned by the judicial department, since the matter was a political one.

[3] De Geofroy *v.* Riggs, 133 U. S., 267.

[4] No case is known in which a treaty of the United States has been declared unconstitutional. John W. Foster, usually an accurate writer, in his *Practice of Diplomacy* (pp. 290-1) implies that this was done in the case of *In re* Dillon, 7 Sawyer, 56, 7 Fed. Cas., 710. But an examination of this case shows that, although the judge was at first of the opinion that Article VI of the amendments to the Constitution set aside a provision of the French consular convention of 1853, the final decision in the case was based on the idea that there was no conflict between the Constitution and the treaty. See Moore, *Digest of Internat. Law*, V, 78-81, 168; Crandall, *Treaty-Making and Enforcement*, 497.

The International Prize Court Convention signed at the Hague in 1907 provided for the carrying of appeals to such court from the national prize

and all earlier enactments, whether of Congress or of state legislatures. This statement is true of the acts of state legislatures, whether they are passed before or after the treaty is made; for Article VI of the Constitution, already cited, requires judges in every state to be bound by all treaties made under the authority of the United States, "anything in the constitution or laws of any state to the contrary notwithstanding."[1] This injunction upon state judges and the rule that treaties are the supreme law of the land are enforced through the appellate jurisdiction of the Supreme Court over the decisions of state courts interpreting treaties.[2]

In the case of prior acts of Congress conflicting with treaties, the Constitution is not so explicit. But it apparently puts them on an equal footing.[3] Although the subjects upon which Congress may exercise its powers are, to some extent at least, enumerated in the Constitution, while those upon which the treaty-making power may act are unenumerated, it is nevertheless well established that the powers of Congress and those of the treaty-making body may overlap and operate upon the same subjects and may

courts of the signatory parties. Doubt arose, however, whether such an agreement could constitutionally be entered into by the treaty-making power, in view of the provision of our Constitution vesting the judicial power of the United States in the Supreme Court and inferior courts established by Congress. This difficulty was resolved through the device of attaching to the Convention an additional protocol providing that, when the national prize courts have jurisdiction, recourse to the international court can only be exercised against the United States in the form of a trial *de novo*, consisting of an action in damages for the injury caused by the capture; and the Senate ratified the convention on this understanding. Charles, *Treaties*, etc., 250, 262-3. In order to formulate the law to be administered in the international prize court, a conference was held at London which, in 1909, issued a Declaration containing a codification of international maritime law. The ratification of this Convention was advised by the Senate of the United States, but Great Britain failed to ratify on account of the adverse attitude of Parliament. *Ibid.*, 266-82. See also President Taft's Annual Message, 1910, *For. Rels. of U. S.*, 1910, p. VIII.

[1] For fuller discussion of this much-debated topic, see Butler, *The Treaty-Making Power of the United States* (New York, 1902); Corwin, *National Supremacy* (New York, 1913); Willoughby, *Constitutional Law of the U. S.*, Chap. XXXV.

[2] Cf. Dodge *v.* Woolsey, 18 How., 355.

[3] Whitney *v.* Robertson, 124 U. S., 190.

be exerted for the accomplishment of the same ends. If this were not true, the treaty-making power would be so limited as very greatly to impair its effectiveness. That it is subject to some limitations, however, there can be no doubt. It cannot, for example, alter the constitutional distribution of powers, *e. g.*, transfer the power to declare war to the President. Any such attempt would be a colorable, but not a real, exercise of the treaty-making function.

There is abundant judicial opinion to the effect that a treaty overrides a prior act of Congress in so far as it conflicts with it, provided that the treaty is self-executing.[1] Thus a treaty of peace operates to repeal the act or joint resolution of Congress declaring war.[2] As Butler points out, however, "it more often happens that the statute abrogates, and supersedes, the treaty, than that the treaty abrogates, and supersedes, the statute; not because a statute is a higher order of law than a treaty, but because the statute goes into effect without further Congressional action, while the treaty may, and, in many instances, does, require such assistance."[3]

EXECUTIVE ENFORCEMENT

In some cases it happens that the duty of enforcing treaty provisions rests primarily upon the Executive rather than upon the courts. As already indicated, treaties may be

[1] See Taylor *v.* Morton, 2 Curtis C. C., 454; U. S. *v.* Lee Yen Tai, 185 U. S., 213; the Cherokee Tobacco, 11 Wall., 616, cited in Willoughby, *Constitution*, 486-7, and cases cited in Crandall, *Treaty-Making and Enforcement*, 161, note 12. As to whether treaties modifying revenue laws are self-executing, see p. 211, below.

[2] For another illustration see Moore, *Digest of Internat. Law*, V. 370, citing 23 Op. of U. S. Atty.-Gen., 545, where it is said: "The provisions of the convention with China proclaimed December 8, 1894, were self-executing, so as to modify or repeal a prior statute (of Congress) with which they were in conflict."

[3] *Treaty-Making Power of the U. S.*, II, 85-6. If a treaty overrides a prior inconsistent act of Congress, it follows, *a fortiori*, that the treaty power may constitutionally operate upon the subjects in regard to which Congress is given by the Constitution the power of legislating, but in respect to which the power has not been exercised, provided such matters are appropriate subjects of international negotiation.

considered not only as declaring the law of the land but as imposing international responsibilities and duties upon our Government. When a question arises as to the performance of such duties, it devolves primarily upon the Executive to see that the treaty provisions are enforced, provided that such provisions are operative without auxiliary legislation, and provided, farther, that neither Congress nor the treaty has conferred upon the courts jurisdiction over the question. To this end the President may issue orders and instructions to the appropriate executive subordinates, or by virtue of his position as commander-in-chief of the army and navy he may use the armed forces. Thus has been upheld, under the Hague Convention of 1907 concerning the internment by a neutral power of belligerent troops found in its territory,[1] the action of the President in ordering the arrest and internment of Mexican troops found violating the territory of the United States.[2] Again, in the case of the Rush-Bagot agreement of 1817 limiting naval armament on the Great Lakes, "the executive orders of the Secretary of the Navy sufficed for full compliance with its terms for a year after its adoption."[3] Similarly, by executive order, military forces of the United States were several times landed in New Granada (Colombia) in order to carry out the provision of the treaty of 1846 with that country whereby we undertook to guarantee the "perfect neutrality" of the Isthmus of Panama.[4] It is obvious that with such matters the courts have nothing to do.

Again, prior to the enactment of Congressional extradition statutes, cases sometimes arose in which the Presi-

[1] Malloy, *op. cit.*, 2298.

[2] *Ex parte* Toscano, 208 Fed. 938.

[3] J. W. Foster, secretary of state, in Report on Rush-Bagot Agreement, December, 1892, Sen. Ex. Doc. 9, 52d Cong., 2d sess., pp. 11, 14. There was at that time on the statute books, however, an act of Congress placing within the discretion of the President the extent of the naval force to be maintained upon the Great Lakes. *Ibid.*, p. 15; 3 Stat. at L., 217.

[4] Malloy, *Treaties*, etc., 312; "Use by the U. S. of a Military Force in the Internal Affairs of Colombia," Senate doc. 143, 58th Cong., 2d sess.

dent alone carried out the provisions of extradition treaties. Justice Gray said in one of the Chinese Exclusion cases: "The surrender, pursuant to treaty stipulations, of persons residing or found in this country, and charged with crime in another, may be made by the executive authority of the President alone, when no provision has been made by treaty or statute for examination of the case by a judge or magistrate. Such was the case of Jonathan Robbins, under article 27 of the treaty with Great Britain of 1794, in which the President's power in this regard was demonstrated in the masterly and conclusive arguments of John Marshall in the House of Representatives." [1] Furthermore, it has been held that the provision of the Hague Convention of 1907 concerning the rights and duties of neutrals in regard to the internment of belligerent troops by a neutral power "does not require legislation to render it effective, and is therefore a part of the law of the land which the President has full power to execute." [2]

As indicated in the next preceding chapter, the President, too, has sometimes carried out general treaty provisions by entering into special executive agreements for the settlement of pecuniary claims against foreign governments. An instance in which the President carried into effect the Hague Convention for the pacific settlement of international disputes occurred in 1903, when he entered into a special agreement for the submission to the Hague court of claims of American citizens against Venezuela. It is also within the power of the President indirectly to execute treaties by carrying out, either finally or subject to judicial review, the laws enacted by Congress for their enforce-

[1] Fong Yue Ting *v.* United States, 149 U. S., 698, at p. 714. See Fed. Cas. 16175 and case of British Prisoners, 1 Woodbury and Minot, 66; and cf. Butler, *Treaty-Making Power*, sect. 434. For Marshall's argument, see Annals of Congress, vol. X, cols. 596-618 (March 7, 1800). *Per contra*, cf. *In re* Kaine, 14 How., 103, quoted by Crandall, *Treaty-Making Power*, 230 note.

[2] Crandall, *Treaty-Making*, 245, citing *Ex parte* Toscano *et al.* (1913), 208 Fed., 938.

ment,[1] or to direct his attorney-general to bring appropriate proceedings in the federal courts for this purpose, *e. g.*, a bill in equity to secure an injunctive order to protect aliens in their treaty rights.[2]

CONGRESSIONAL ENFORCEMENT

This brings us to a consideration of the enforcement of treaties through Congressional legislation. After enumerating various specific powers of Congress, the Constitution goes on to confer upon that body power to pass all necessary and proper laws for carrying into execution powers vested by the Constitution in the government of the United States, or in any department or officer thereof.[3] Under this provision Congress is fully empowered to enact appropriate legislation to carry out treaty stipulations[4]—an authority which it frequently exercises, since most treaties of importance require auxiliary legislation to carry them into effect. Thus Congress may enact legislation empowering the President to extradite to foreign countries fugitives accused of crime, in accordance with treaty provisions; or it may by

[1] Cf. the statement of Justice Gray in the case of Fong Yue Ting, 149 U. S., 698, at p. 714, cited above, p. 176, note 1. It has also been argued that, on the analogy of the Debs and Neagle cases (135 U. S., 1; 158 U. S., 564), the President and federal courts may take appropriate measures, such as the use of armed forces or of injunctions, to enforce a treaty not only by punishing violators but by preventing its violation. See Corwin, *National Supremacy*, 293; *ibid.*, *President's Control of Foreign Relations*, 105-8.

Mr. C. H. Burr, in his *Treaty-Making Power of the U. S.*, says (p. 392): "It is thus conclusively established that when the Constitution says that the President shall execute the laws, treaties, since they have the force of laws, come within this constitutional provision." He bases this conclusion upon the assumption that, in the Philadelphia convention, the phrase "enforce treaties" was stricken from among the powers of the President as being superfluous since treaties were to be laws. In reality, however, the phrase was stricken from among the powers of Congress, not of the President. *Documentary History of the Constitution*, III, 601.

[2] See W. D. Lewis, "Treaty Powers: Protection of Treaty Rights by the Federal Government," *Annals of the Am. Acad. of Polit. and Soc. Sci.*, XXXIV, 325-6, where it is pointed out that, unless otherwise expressly directed by Congress, the President may use the secret service placed at his disposal to discover plots which, if carried out, would violate rights guaranteed by treaty.

[3] Art. I, sect. 8, cl. 18.

[4] Neely *v.* Henkel, 180 U. S., 109, at p. 121; Missouri *v.* Holland, 252 U. S., 416; 40 Sup. Ct., 382 (1920).

law provide administrative agencies which the President can utilize in enforcing treaty stipulations.[1] Again, as already indicated, Congress is an important agency in providing for the enforcement of treaties, through its power of regulating the jurisdiction of the courts and of passing judicial procedural laws.

It is now established that the power of Congress to enact legislation for the enforcement of treaties is broader than the ordinary legislative power conferred by the Constitution. The power of making treaties would be an empty one in many cases unless Congress had the power of enforcing them, even though in the absence of such treaties Congress would have no such power. The power of legislating for the protection of migratory birds, prior to the making of a treaty on the subject, was entirely in the hands of the state legislatures, and Congressional legislation attempting to provide federal protection was unconstitutional.[2] But after a treaty was concluded with Great Britain on this subject in 1916, Congress passed a law (1918) to enforce its provisions, and the law was held constitutional by the federal district court which had, prior to the making of the treaty, declared such legislation unconstitutional.[3] Furthermore, both the treaty and the act of Congress were subsequently declared constitutional by the Supreme Court.[4] The President has also issued proclamations containing regulations adopted by the Secretary of Agriculture for the enforcement of this treaty act.[5]

As Attorney-General Cushing declared in 1854, "A treaty, though complete in itself and the unquestioned law

[1] For example, the act of Congress of June 6, 1900, providing for the extradition of criminals from the United States to any foreign territory under the control of the United States was appropriate legislation by Congress in execution of the stipulations of the treaty of peace with Spain. Neely *v.* Henkel, cited *supra.*

[2] U. S. *v.* McCullagh, 221 Fed., 288; U. S. *v.* Shauver, 214 Fed., 154.

[3] 39 Stat. at L., 1702; 40 Stat. at L., 755; U. S. *v.* Thompson, 258 Fed. 257; U. S. *v.* Samples, 258 Fed., 479; U. S. *v.* Selkirk, 258 Fed., 775.

[4] Missouri *v.* Holland, 252 U. S., 416; 40 Sup. Ct., 382 (1920).

[5] See, *e. g.*, proclamation No. 1531 of President Wilson, issued July 28, 1919.

of the land, may be inexecutable without the aid of an act of Congress. But it is the constitutional duty of Congress to pass the requisite laws. But the need of further legislation, however, does not affect the question of the legal force of the treaty *per se.*''[1] In other words, it is necessary to make a distinction between the international and the constitutional or municipal aspects of treaties, between the question of the international validity of a treaty and that of its execution municipally through the action of the law-making body. ''The treaty-making power, if exercised with reference to a matter which is properly the subject of negotiation with a foreign country, can bind our Government fully in an international sense, though the action of other departments of the Government may still be necessary to execute the treaty.''[2] On numerous occasions in our history the treaty-making power has undertaken to bind the United States internationally to take or not to take certain action requiring for its execution or observance the consent or coöperation of other branches of the Government. Most of our important treaties, from Jay's treaty of 1794 to the present time, have required for their enforcement the appropriation of money by act of Congress. Again, the treaty power may undertake to bind the United States internationally to go to war or to take warlike action under certain circumstances.[3]

[1] 6 Op. U. S. Att.-Gen., 291, quoted in Moore, *Digest of Internat. Law*, V, 370. For qualification of that part of the Attorney-General's statement in which he speaks of the ''Constitutional duty'' of Congress to pass enforcement legislation, see p. 200, below.

[2] Mathews, ''The League of Nations and the Constitution,'' *Michigan Law Rev.*, XVIII, 386 (March, 1920).

[3] Thus by the Webster-Ashburton treaty of 1842 we agreed with Great Britain to maintain a naval force on the coast of Africa for the suppression of the slave trade. Malloy, *Treaties*, etc., 655. In our treaty of 1846 with New Granada (Colombia), we guaranteed the ''perfect neutrality'' of the Isthmus of Panama (*ibid.*, 312) and in the Clayton-Bulwer treaty of 1850 we entered into a similar covenant with Great Britain respecting the isthmian canal (*ibid.*, 661). Through our treaty of 1904 with Panama we undertook to guarantee and maintain the independence of that republic (*ibid.*, 1349), and at about the same time we extended, by implication, the same guarantee to Cuba (*ibid.*, 364). ''These treaty provisions do not go as far as to require a declaration of war, but they almost necessarily imply intervention or warlike measures on

On the other hand, we have from time to time entered into treaties which attempt to place a limit internationally upon the exercise by Congress of powers granted to it by the Constitution. Thus under the so-termed Bryan peace treaties the United States agreed with a number of powers not to go to war with the other contracting party pending investigation of the matter in controversy by an international commission.[1] Furthermore, by the Rush-Bagot agreement between the United States and Great Britain in 1817 the two powers undertook mutually to limit the extent of their naval armaments on the Great Lakes, thereby placing a limit, internationally, upon the power of Congress to provide for the construction of warships upon a designated portion of our coast-line.[2]

When by treaty we bind ourselves to take some action which, under the Constitution, can be taken only by Congress, objection may be raised that Congress is deprived of full discretion and freedom of action, and its decisions become purely perfunctory. It is true that Congress may be placed under a moral obligation to take or not to take certain action by way of fulfilment of treaty stipulations, and, as a matter of practical politics, the obligation might be so strong that Congress would have no alternative but to perform it, just as it is morally obliged to appropriate money to pay the salaries of federal judges. Speaking legally, however, there would be no method of compelling Congress to take or not to take the action necessary to fulfil the obligation incurred under the treaty. Since the

our part in case the independence or neutrality guaranteed is threatened or in imminent danger.'' Mathews, ''The League of Nations and the Constitution,'' *Mich. Law Rev.*, XVIII, 385. A somewhat similar treaty project negotiated with Nicaragua in 1884 was pending in the Senate when Cleveland became President. He withdrew it, because, as he stated in his annual message of December, 1885, it was ''coupled with absolute and unlimited engagements to defend the territorial integrity of the States where such interests lie.'' He held that this clause was an ''entangling alliance,'' inconsistent with the declared public policy of the United States. Senate rept. 1944, 51st Cong., 2d sess., p. 17.

[1] See, *e. g.*, 38 Stat. at L., 1853.

[2] Malloy, *op. cit.*, 629.

Constitution provides that treaties duly made under the authority of the United States are the supreme law of the land, it might at first sight be thought that Congress, which, of course, is bound by the Constitution, would be legally required to pass enforcement legislation. But, as already pointed out, treaties are not supreme law of the land unless self-executing, and the Constitution places treaties and acts of Congress upon an apparently equal footing. If, as the courts have often held, Congress can constitutionally annul a treaty by subsequent conflicting legislation without the consent of the other contracting party, it can hardly be maintained that Congress is constitutionally bound to take affirmative action in passing legislation to enforce a treaty. If it were the constitutional duty of Congress to pass enforcement legislation, then, *a fortiori,* it would be the constitutional duty of Congress not to pass conflicting legislation.[1] To hold that Congress is so bound is to confuse the validity of a treaty with its execution and to lose sight of the distinction between the international and the municipal aspects of treaties.[2] Without the consent of the foreign power, Congress, of course, could not abrogate the international obligation incurred. But there would be no constitutional or legal impediment to its annulment of the treaty, as far as our municipal law is concerned. Speaking

[1] H. St. G. Tucker denies that Congress is even morally bound to declare war when a treaty provision requires the United States to do so. "If," he says, "the power given to Congress to declare war means anything, it means that the power must be exercised by the free, independent, and untrammelled judgment of the representatives of the people, or it means nothing. To be morally bound is as effective as is being legally bound. . . . There is nothing in our history to give assurance that Congress would recognize the authority of the treaty power to bind Congress to declare war in a cause that it did not approve. The decision as to the policy, as to the existence of the duty, and as to the power to create the duty, would rest with Congress." *Central Law Journal,* LXXXIX, 80-81 (1919). See also Sargent, "The Congress and Treaties," *ibid.,* 370-80.

[2] In House rept. 37, 40th Cong., 2d sess., p. 5, it is said that if a treaty "be not inconsistent with the spirit and purpose of the Government, Congress is bound to give it effect, by necessary legislation, as a contract between the Government and a foreign nation." But it is implied that this is an international, rather than a constitutional, obligation, and also that Congress is to be the judge as to whether the treaty contains the inconsistency indicated.

of this distinction, ex-President Taft declared that "the suggestion that, in order to carry out such an obligation [to declare war] on the part of the United States, it would be necessary to amend the Constitution, grows out of a confusion of ideas and a failure to analyze the differences between the creation of an obligation of the United States to do a thing and the due, orderly, and constitutional course to be taken by it in doing that which it has agreed to do."[1]

THE FUNCTION OF THE HOUSE OF REPRESENTATIVES

The House of Representatives, by virtue of its part in law-making, is an important branch of the treaty-enforcing power. This does not constitute it a part of the treaty-making power. But since there is no legal means of compelling the House to pass legislation necessary to enforce treaty stipulations, it has come to be true as a practical proposition that treaty provisions which are inexecutable without auxiliary legislation must, in many cases, receive the approval of the House of Representatives before they can be carried into effect. The function of the House in the enforcement of treaties first came under serious discussion in connection with the Jay treaty of 1794. Certain provisions of this treaty required for their enforcement the appropriation of sundry sums of money. The House passed a resolution calling upon President Washington for Jay's instructions, together with other papers and documents drawn up in connection with the negotiation.[2] The granting of this request would have had the effect of making the House a participant, at least retrospectively, in the treaty-making process, as well as of enabling it to exercise a more intelligent discretion in deciding upon the expediency of enforcement legislation. Washington emphatically declined to comply with the request, on the ground that

[1] *Enforced Peace*, 67.

[2] Annals of Congress, 4th Cong., 1st sess., 759-60; Hinds, *Precedents*, II, 982-984.

the power of making treaties is exclusively vested in the President and Senate, that "the assent of the House of Representatives is not necessary to the validity of a treaty," and that treaties, when duly made by the President and the Senate, become "obligatory" and "the law of the land." [1]

Washington's general position, as stated, was correct, and to a certain extent the House itself concurred in it when, in reply to his message, it adopted a resolution disclaiming any agency in the making of treaties,[2] and when, subsequently, it passed the necessary appropriations. The principle is, however, subject to the following interpretations and modifications. The assent of the House is not necessary to the validity of a treaty, but it may be quite essential to its execution. A treaty is *ipso facto* the law of the land if self-executing. But if auxiliary legislation is required for its execution, it is not law of the land in such a sense that the courts will enforce it before such legislation is enacted. A treaty duly made is obligatory, in an international sense, upon our government. But there is no legal means whereby Congress can be compelled to perform the obligation. The precedent established in the contest between Washington and the House of Representatives indicates only, therefore, (1) that the House has no share in treaty-making, even retroactively, and (2) that, consequently, the President not only does not have to consult the House prior to or during the negotiation of a treaty (even though the treaty calls for an appropriation), but does not have to transmit to that body documents relating to the negotiation after the treaty shall have been approved by the Senate.

There was, however, an important difference of opinion between the President and the House which was not brought to a settlement. Washington held that when the faith of

[1] Richardson, *Mess. and Pap. of the Presidents*, I, 194-6.
[2] Annals of Congress, 4th Cong., 1st sess, 771, 782.

the nation is pledged the House is bound to pass the necessary appropriations as a mere ministerial act, without the exercise of discretion or any consideration as to the expediency or inexpediency of the treaty provisions; whereas the House, in its resolution, asserted "the constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect."[1] This, at all events, is clear, that although the House is in control of its own proceedings to the extent that it may deliberate upon such a question of expediency if it so desires, its deliberations on the matter will not always be carried on in the light of full information, because it cannot compel the President to surrender papers and documents beyond the bare text of the treaty.[2] The result of this mixed situation has been that, while the House still holds to the existence of its discretionary power in the enforcement of treaties, as a matter of fact it has seldom, if ever, refused to take the necessary action to provide the means of enforcement.[3]

[1] Annals of Cong., *loc cit.* See also Cong. Globe, 42d Cong., 1st sess., 835, April 20, 1871.

[2] H. St. G. Tucker, in chapter VIII of his *Limitations on the Treaty-Making Power,* undertakes to refute the contention of other eminent authorities on the treaty-making power that the contest between President Washington and the House of Representatives resulted in a victory for the President and that all of the Presidents since Washington have followed the position which he took in that contest. In reality there is not so much difference of opinion between Mr. Tucker and the other authorities as might at first sight appear. As we have seen, Washington really took two positions which are closely connected, yet distinguishable; first, that the House had no share in treaty-making and was not entitled to the papers, and second, that the House was bound to pass the appropriation. It would appear that Mr. Tucker is speaking of the second position, while the other authorities are speaking of the first. Washington did not maintain that a treaty could appropriate money of its own force, nor did he deny that the action of the House was necessary for this purpose, as Mr. Tucker seems to imply.

[3] A commercial reciprocity convention with Mexico in 1883, however, provided that it should not go into effect until supplementary legislation had been passed by Congress, but also that such legislation should be passed within a year. Congress failed to act, although the time was twice extended, and the convention finally lapsed. Malloy, *Treaties,* etc., 1151; Moore, *Digest of Internat. Law,* V, 222. For the reasons why Congress did not act, see reports of majority and minority of House Committee on Ways and Means on the Mexican Treaty of January 20, 1883, House Report No. 2615, 49th Cong., 1st sess. See also House rept. 1848, 48th Cong., 1st sess. (1884). Although not strictly in point, it may also be noted in this connection that Congress has

On account of the special function of the House of Representatives in fiscal legislation, the enforcement of treaties through the enactment of measures raising or appropriating public funds stands, at least theoretically, upon a somewhat different footing from other legislative enforcement. The Constitution provides that no money shall be drawn from the treasury except in consequence of appropriations made by law; and, although treaties are declared by that instrument to be law, treaty provisions requiring appropriations are not self-executing, but need an act of Congress to put them into effect.[1] But the Constitution also requires that all bills for raising revenue shall originate in the House of Representatives, and, by custom, this special privilege of the House has been broadened to include bills appropriating money. Although the Senate may, of course, amend money bills, the fact that such measures must originate in the lower House forms a plausible basis for the contention of that body that it has special power in connection with money bills enacted to enforce treaties.[2]

thus far failed to confer upon the Federal Courts jurisdiction in criminal cases in which the treaty rights of aliens are alleged to be injured by mob violence. See above, p. 188.

[1] Turner *v.* Am. Baptist Missionary Union, 5 McLean, 347; Frelinghuysen *v.* Key, 110 U. S., 64; L'Abra Silver Mining Co. *v.* U. S., 175 U. S., 423.

[2] It is true that the Constitution merely says that all "bills" for this purpose shall originate in the lower house. Admittedly, treaties are not bills; so that this provision is not literally applicable to the question in hand. Nevertheless, in practice, the spirit of the provision has been followed rather than the letter. See Willoughby, *Constitutional Law*, I, 488. The position of the House was stated in a resolution which passed that body in 1880 by a vote of 175 to 62 as follows: "Resolved, That it is the sense of this House that the negotiation by the Executive Department of the Government of a commercial treaty whereby the rates of duty to be imposed on foreign commodities entering the United States for consumption should be fixed would, in view of the provision of section 7 of article I of the Constitution of the U. S. be an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives." Hinds, *Precedents*, II, 989. In 1884 the House Committee on Ways and Means reported that, "it is true that the question has been raised whether it would not be competent for the President and Senate alone to enter into treaties which would change the laws for the collection of revenue, but the practice has been uniform, and the House has always insisted that where the rates of duty are changed by treaty, the approval of the Congress is necessary for its execution." House rept. 1848, 48th Cong., 1st sess., p. 1. In support of this position, cf. the able report of J. R. Tucker, chairman of the House Judiciary Committee, 49th

One of the most notable occasions on which this contention of the House has been asserted since the debate on the Jay Treaty was the voting of the appropriation to carry out the treaty of 1867 with Russia for the purchase of Alaska. In the bill carrying the necessary appropriation of $7,200,000 the House inserted an amendment which, after reciting that the stipulations of the treaty were among the subjects over which Congress had jurisdiction and that it was necessary that the consent of Congress be given to such stipulations before they could be carried into effect, declared "That the assent of Congress is hereby given to the stipulations of said treaty."[1] The Senate, however, declined to concur in this amendment, and a compromise was agreed upon of such character that, as finally enacted, the bill merely appropriated the necessary sum to fulfil the stipulations of the treaty, since they "cannot be carried into full force and effect except by legislation to which the consent of both houses of Congress is necessary."[2] The Senate thus formally conceded that, as far as appropriations, at all events, are concerned, treaties are not fully self-executing.

That an international responsibility rests upon the Government to fulfil its treaty stipulations, that a moral obligation rests upon the legislative body to enact auxiliary legislation carrying necessary appropriations, and that

Congress, holding that a treaty cannot change revenue laws without the sanction of the House. House rept. 4177, 49th Cong., 2d sess. (1887), reprinted as Chap. XI of H. St. G. Tucker's *Limitations on the Treaty-Making Power.* Cf. House rept. 2680, 48th Cong., 2d sess., "Power of President to Negotiate Treaties With Foreign Governments." The House Committee on Foreign Affairs submitted a report in 1881, however, advising against the adoption of a resolution which declared that the treaty-making power "does not extend to treaties which affect the revenue, or require the appropriation of money to execute them" on the ground that the words "all bills for raising revenue" in section 7 of article I of the Constitution do not embrace treaties. House rept. 225, 46th Cong., 3d sess. Hinds, *Precedents,* II, 989-90. But see Senate doc. 206, 57th Cong., 2d sess., p. 9.

[1] House Journal, 40th Cong., 2d sess., p. 1064.

[2] 15 Stat. at L., 198. See also Crandall, *op. cit.,* 176; Moore, *Digest of Internat. Law,* V, 226-229, quoting Wharton, *Internat. Law Digest,* II, 21-23. See also majority and minority reports of the House Committee on Foreign Affairs. House rept. 37, 40th Cong., 2d sess.

failure at this point constitutes a just cause of war, was asserted not only by President Jackson but by the House of Representatives, in 1835, upon the failure of the French Chamber of Deputies to appropriate sums necessary to pay the claims of American citizens under the French convention of 1831.[1] The same position was taken by the executive department of our government when the Spanish Cortes failed to pass the appropriation necessary to pay a claim—the "Mora Claim"—which, in 1886, the Spanish Council of Ministers had agreed to settle.[2] In this case, Congress, also, by joint resolution, requested the President to insist upon payment.[3]

TREATIES AFFECTING THE REVENUE LAWS

A second phase of financial enforcement legislation arises in connection with treaties whose provisions purport to affect the custom revenues. These revenues are in a special sense under the control of Congress, in view of both the provision of the Constitution that "all bills for raising revenue shall originate in the House of Representatives" and the grant to Congress in that instrument of the power to regulate commerce with foreign nations. The control of Congress over the subject, however, is not so exclusive as to prevent the treaty-making power from entering into compacts which purport to affect the custom revenues. This is, indeed, a usual and proper subject of international negotiation, and many compacts upon it, especially relating to commercial reciprocity, have been entered into. The question which here arises, however, is whether such international agreements modify existing tariff laws of their own force or whether they require Congressional legisla-

[1] Reports of Committees, No. 133, 23rd Congress, 2d sess., *Debates*, 23rd Cong., 2d sess., 1531-1634; Crandall, *op. cit.*, 174; Hinds, *Precedents*, II, 975. In his message to Congress on Dec. 1, 1834, Jackson recommended "that a law be passed authorizing reprisals upon French property in case provision shall not be made for the payment of the debt at the approaching session of the French Chambers." Richardson, *Mess. and Pap. of the Presidents*, III, 106.

[2] *For. Rels. of U. S.*, 1895, part II, pp. 1162 ff.; J. B. Moore in *Polit. Sci. Quar.*, XX, 403-407 (Sept., 1905).

[3] 28 Stat. at L., 975; *For. Rels.*, 1894, app. I, 364-450.

tion to carry them into effect. As we have seen, the general rule laid down by the courts is that a treaty which is duly entered into, which does not violate the Constitution, and which relates to a proper subject of international negotiation, supersedes prior conflicting acts of Congress and will be so regarded by the courts, in so far as its provisions are self-executing. To this general rule, however, an apparent exception arises in the case of treaty provisions which conflict with prior acts of Congress fixing the rates of duty upon goods imported into the country, especially when considerable changes are made. Commercial reciprocity treaties commonly provide for a reduction of tariff rates in certain contingencies. But such rates are not, as a rule, set aside automatically by treaty, for Congressional legislation is necessary in order to effect that end.

The question as to the character of legislation appropriate for this purpose came up prominently in connection with the enforcement of the reciprocal commercial convention of 1815 with Great Britain. The Senate inclined to the view that the treaty was self-executing and that, at most, an act of Congress merely *declaring* the treaty in effect was all that was necessary. The House of Representatives, on the other hand, while not denying the validity of the treaty, proposed to pass a measure reiterating in detail the provisions of the instrument relating to tariff rates, on the theory that such legislation was necessary to give these provisions full force. Conference committees succeeded in arranging a compromise of such character that, as finally passed, the bill read as follows: "Be it enacted and declared that so much of any act as imposes a higher duty of tonnage, or of impost on vessels and articles imported in vessels of Great Britain than on vessels and articles imported in vessels of the United States, contrary" to the convention of 1815 "be, from and after the date of the ratification of the said convention and during the continuance

thereof deemed and taken to be of no force or effect." [1]

Although in this instance the matter was settled by compromise, the tendency has since been, more and more, to accept the views of the House, notwithstanding that individual opinions to the contrary have sometimes been expressed. In 1844 Rufus Choate, in reporting adversely for the Senate Committee on Foreign Relations upon a proposed reciprocity convention with the German Zollverein, observed that the convention purported to change duties which had been laid by law, and that the Committee was "not prepared to sanction so large an innovation upon ancient and uniform practice in respect of the department of government by which duties on imports shall be imposed. . . . In the judgment of the Committee the legislature is the department of government by which commerce should be regulated and laws of revenue be passed." [2]

An international convention of 1904, to which the United States was a party, provided that hospital ships should be exempted, in time of war, from all port dues and taxes. It was considered by our Government, however, that the agreement could not be carried into effect in this country without Congressional legislation. Consequently the secretary of state recommended the passage of a bill for the purpose of carrying out the treaty, and the House Committee on Foreign Affairs, in its report, declared such legislation to be necessary.[3]

The question under discussion has come before the courts in connection with the determination of the date when the tariff rates provided for by a convention go into effect.

[1] 3 Stat. at L., 255; see also Moore, *Digest of Internat. Law*, V, 223; Crandall, *op. cit.*, 184-188; Hinds, *Precedents*, II, 975-979.

[2] Senate doc. 231, 56th Cong., 2d sess., VII, 36; Hinds, *Precedents*, II, 998-1001. Of the view thus expressed, John C. Calhoun, while secretary of state, declared: "If this be the true view of the treaty-making power it may be truly said that its exercise has been one continual series of habitual and uninterrupted infringements of the Constitution." Moore, *Digest of Internat. Law*, V, 164. Political hostility to President Tyler probably had some influence upon the attitude of the Senate committee.

[3] Malloy, *Treaties*, etc., 2137; 35 Stat. at L., pt. 1, p. 46; 35 Stat. at L., pt. 2, pp. 1854-62; House rept. 533, 60th Cong., 1st sess. (1908).

Attorney-General Cushing ruled in 1854 that the provisions of the reciprocity convention of 1831 with France went into effect on the date of the exchange of ratifications as provided in the convention, on the theory that such provisions were self-executing and therefore required no Congressional legislation.[1] In view of the doubts that have arisen on the subject, however, it has become customary to insert clauses in such conventions stipulating that the instrument shall go into effect only when approved by Congress, or when appropriate enforcement legislation has been enacted. "If the treaty-making power," said Attorney-General Miller, "in all treaties whose execution requires the exercise of powers committed to Congress, should uniformly provide in the treaties for their proper submission to Congress before they should be effective, consequences might be avoided which may jeopardize the credit of the nation."[2] This principle has been acted upon in numerous instances. Thus, in the Hawaiian reciprocity convention of 1875 it is provided that the agreement shall not take effect "until a law to carry it into operation shall have been passed by the Congress of the United States."[3]

In the case of the Cuban reciprocity convention of 1903, no such provision was at first included. But the Senate, in advising and consenting to ratification, proposed and secured the adoption of an amendment providing that the convention should not take effect until it had been approved by Congress;[4] and the Supreme Court subsequently held

[1] 6 Op. Atty.-Gen., 295.

[2] 19 *Ibid.*, p. 278.

[3] Malloy, *Treaties*, etc., 917. Similar provisions were inserted in the British and Mexican reciprocity conventions of 1854 and 1883 respectively, and in the British treaty of 1871. Malloy, *op. cit.*, 672, 713, 1151. On the history of the Hawaiian treaty, see Sen. doc. 206, 57th Cong., 2d sess.

[4] Malloy, *Treaties*, etc., 357; Sen. doc. 47, 57th Cong., 2d sess., "Jurisdiction of Senate to Act upon Reciprocity Treaties." The Senate had previously inserted in the Mexican reciprocity convention of 1883 a similar provision, but in that case had qualified its concession by providing also that enforcement legislation should be enacted within twelve months from the date of the exchange of ratification. Malloy, *ibid.*, 1151; and see Minority Report of Ways and Means Committee of the House regarding the enforcement of the treaty. House rept. 2615, 49th Cong., 1st sess., pp. 15-16.

that the convention went into effect on the date of the passage of the act of Congress approving the convention, despite the fact that the convention also contained a provision that it should go into effect ten days after the exchange of ratifications.[1]

In this same act of Congress a proviso was inserted to the effect that "nothing herein contained shall be held or construed as an admission on the part of the House of Representatives that customs duties can be changed otherwise than by an act of Congress originating in said House."[2] The act also provided that, while the Cuban convention was in force, no sugar, the product of any other foreign country, should be admitted by treaty or convention into the United States at a lower rate of duty than that provided by the tariff act of 1897.[3] This latter provision was objected to by the minority of the House Committee on Ways and Means, on the ground that "Congress has no right to attempt to bind the treaty-making power of the United States in a succeeding Congress or under a succeeding administration."[4] The minority protest, however, was unavailing, and the provision may be taken as fairly indicating the attitude of Congress upon the operation of the treaty-making power over the subject of tariff duties on foreign commerce. A corresponding attempt on the part of the treaty-making body to regulate custom duties and to forbid Congress to alter such regulations would, as to such prohibition, be clearly *ultra vires*.[5]

[1] U. S. *v.* Am. Sugar Refining Co., 202 U. S., 563 (1905).

[2] 33 Stat. at L., pt. 1, p. 3

[3] *Ibid.* See the debate on the bill in the House and especially in the Senate. Cong. Record, 58th Cong., 1st and 2d sessions. Hinds, *Precedents*, II, 996-8.

[4] House rept. 1, pt. 2, 58th Cong., 1st sess., p. 2.

[5] Cf. Fuller, C. J., in Downes *v.* Bidwell, 182 U. S., 370. In this case four justices held that the treaty power alone cannot incorporate ceded territory into the United States. This position is criticized by Willoughby on the ground that it is inconsistent with the principle that the treaty power and the law-making power are coördinate in authority. *Constitutional Law of U. S.*, I, 430. It is to be observed, however, that these two powers are not, in every case, entirely equal and coördinate, since a treaty may sometimes require ancillary legislation in order to put it into effect, because it is not self-executing. See cases cited in note 1, p. 193, *supra*.

The general control which Congress has assumed to exercise over the matter of custom revenues is also shown by the incorporation in various tariff acts, *e.g.*, the act of 1897, of provisions which purport to grant authority to the treaty-making body to enter into custom agreements. From the strictly legal point of view, no such grant is necessary; for the treaty-making body is competent to conclude agreements affecting the custom revenues which are valid internationally,[1] although not necessarily self-executing. But from the practical point of view, it is conceded by the political departments of the government that, in practice, the House of Representatives should be consulted and that Congress should have some influence, albeit indirect, in making, as well as in enforcing, agreements relating to the custom revenues.

It thus appears that in the case of treaties relating to certain matters which, under the Constitution, are delegated to the legislative control of Congress, the treaty-making power has conceded that a treaty should not be put into effect until it has been approved by Congress. This has been agreed to particularly in relation to the regulation of customs revenue, probably for the reason that the exercise of this power is a bone of contention between political parties. The need of party cohesion on tariff policy has doubtless influenced the treaty-making power in its concession to Congress.[2] This, however, has not been the sole influence in this direction. Indeed, the tendency can be discovered in relation to treaties dealing with matters of no financial or political significance.[3]

[1] Cf. Whitney *v.* Robertson, 124 U. S., 190.

[2] A practical consideration operating in this direction was thus indicated by President Cleveland: "As a further objection, it is evident that tariff regulation by treaty diminishes that independent control over its own revenues which is essential for the safety and welfare of any government. Emergency calling for an increase of taxation may at any time arise, and no engagement with a foreign power should exist to hamper the action of the government." Annual Message, Dec. 8, 1885. *For. Rels.*, 1885, XVI, quoted by Moore, *Digest of Internat. Law*, V, 272.

[3] Cf. the provision of the Migratory Bird Convention of 1916 between the United States and Great Britain: "The high contracting powers agree them-

In order to avoid misunderstandings with foreign nations and accusations of bad faith by such nations, one of two practical expedients should be resorted to in all cases in which Congressional legislation is necessary to put a treaty into effect: (1) the treaty should contain an express provision that it is to go into operation only when Congress shall have indicated its approval by passing enforcement legislation; (2) the exchange of ratifications should be withheld by the President until such legislation has been enacted. In order that the treaty power as a whole shall be fully effective, it is desirable, if not essential, that there be good working relations on these lines between (a) the President and Senate, *i.e.*, the treaty-making power and (b) Congress, *i.e.*, the treaty-enforcing authority.

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selves to take, or to propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present convention.'' 39 Stat. at L., 1704.

CHAPTER XII

THE INTERPRETATION OF TREATIES

CLOSELY connected with the enforcement of treaties is their interpretation, for the authorities that enforce are usually required also to interpret—often, in fact, to interpret in the very act of enforcement.[1] On account of the limitations of human language, as well as because of the impossibility of foreseeing all the circumstances and sets of facts that may arise to affect a treaty's application, it frequently happens that doubts may justifiably be entertained as to the meaning and proper interpretation of binding international agreements.

INTERPRETATION BY THE POLITICAL DEPARTMENTS

In the United States interpretations are constantly being placed upon treaties by Congress, by the Executive, and by the courts. In passing legislation for the enforcement of treaty stipulations, Congress must necessarily proceed in accordance with its views of the meaning of these stipulations, and it will often incorporate these views in the legislation which it enacts. Thus in passing the Panama Canal Act of 1912 providing for the exemption of American vessels engaged in the coastwise trade from the payment of tolls on going through the Canal,[2] Congress gave evidence of its view that such an exemption was in accordance with the provisions of the Hay-Pauncefote Treaty. Of course, as hitherto pointed out, Congress can constitutionally enact

[1] "Interpretation" of treaties is sometimes distinguished from "construction" of treaties, but for our purposes the two terms may be considered synonymous.

[2] 37 Stat. at L., pt. I, p. 560.

legislation which abrogates and supersedes prior treaties of binding international force. But such conflict between treaties and acts of Congress is not to be presumed so long as the apparently conflicting provisions can possibly be reconciled. Until the contrary conclusively appears, the presumption is that Congress will guide its action in strict accordance with treaty obligations.

The executive department of the government, likewise, is frequently called upon to place an interpretation upon a treaty. Thus in 1912 our Navy Department, being desirous of securing the sole right of erecting and operating wireless telegraph stations in the Canal Zone and on the Isthmus of Panama, suggested to the State Department that negotiations be entered into with the government of Panama looking to the necessary concessions for this purpose. The State Department, however, in accordance with the opinion of its solicitor, decided that such negotiations were unnecessary, inasmuch as, under the Hay-Bunau-Varilla treaty of 1903 with Panama, our government already enjoyed full and exclusive right and authority to erect and operate wireless telegraph stations, not only in the canal zone, but on the Isthmus of Panama.[1] Again, the same treaty was interpreted in 1907 by the Secretary of War as conferring upon the United States jurisdiction over the waters of Manzanillo Bay below the mean low-water mark; and in accordance with such interpretation the President granted a permit to a certain company to lay a cable in these waters.[2]

The Rush-Bagot agreement of 1817 limited the naval force to be maintained by the United States on the Great Lakes to three vessels of a burden not exceeding one hundred tons each. This restriction was interpreted by our Government, however, as not applying to the revenue service, and in 1892 we had on Lake Michigan in that service an

[1] See the opinion of the Solicitor, *For. Rels. of the U. S.*, 1912.
[2] *For. Rels. of U. S.*, 1908, p. 679.

armed vessel of nearly five hundred tons.[1] An executive interpretation of a treaty which profoundly influenced our national history at an early period was that made by President Washington when he issued his neutrality proclamation of 1793, thereby construing our treaty of alliance of 1778 with France as not requiring us to assist that nation in the war in which she was now engaged.

Many of the communications which pass between our State Department and the corresponding department or diplomatic representatives of other governments with which we have treaty relations have to do with the interpretation of treaties, either indicating the construction placed upon them by our Government or combating that placed upon them by the foreign government, or both.[2] In many instances the State Department puts its own interpretation on treaties whose meaning is disputed. But it sometimes adopts as its interpretation that indicated by other organs of the Government, such as the Supreme Court, the Attorney-General, or the Secretary of War.[3]

The published volumes of the Foreign Relations of the United States are full of diplomatic exchanges revolving around the disputed interpretation of treaties. A secretary of state, in carrying on a diplomatic discussion over the disputed interpretation of a treaty, is usually loath to concede that the counter-arguments of the foreign government are well-grounded, even when he realizes such to be the case, lest he be accused of weakness in maintaining our national rights. Occasionally, however, under circumstances of this sort, our secretary of state has had the grace

[1] Senate Ex. Doc. 9, 52d Cong., 2d sess., p. 31; Moore's *Digest of Internat. Law*, I, 696; Bigelow, *Breaches of Anglo-American Treaties*, 34.

[2] See *For. Rels. of U. S., passim, e.g.*, 1873, p. 720; 1883, p. 418; 1899, p. 746; 1900, p. 914; 1910, pp. 658, 664, 852; 1911, p. 673; 1912, p. 1221.

[3] *For. Rels. of U. S.*, 1910, p. 666; *ibid.*, 1908, pp. 595, 679. In 1888 Secretary Bayard declined to furnish the Swiss minister with our government's interpretation of the trade mark convention, on the ground that the Supreme Court had left untouched "the whole question of the treaty-making power of the General Government over trade-marks and the duty of Congress to pass any laws necessary to carry such treaties into effect." *For. Rels. of U. S.*, 1888, part II, p. 1541.

to admit the justness of the contention of the foreign government. Thus in 1898 the government of Switzerland, by virtue of the most-favored-nation clause of our treaty of 1850 with that state, claimed privileges for Swiss imports into the United States such as we had recently granted to imports from France under the terms of a reciprocity convention. Secretary Day denied the justice of the claim on the ground that a reciprocity treaty is a bargain and not a favor, and that the United States "has consistently maintained the view that the most-favored-nation clause does not entitle a third government to demand the benefits of a special agreement of reciprocity."[1] Shortly afterwards, however, Mr. Day's successor, Mr. Hay, while agreeing with his predecessor that the construction which for almost a century had been uniformly given by our Government to most-favored-nation clauses was that, in the language of John Quincy Adams, they "only covered gratuitous favors, and did not touch concessions for equivalents," nevertheless admitted that when the Swiss treaty of 1850 was signed it was the understanding on both sides that the United States was making an exception to its otherwise uniform policy in this respect.[2] We therefore acceded to the Swiss claim; although, in view of the Swiss construction of the most-favored-nation clauses of the treaty, we shortly afterwards exercised the option allowed by the treaty itself of giving notice of our intention to discontinue the operation of those clauses.

If the executive interpretation of a treaty may vary from one secretary of state to another in the same administration, it follows, *a fortiori,* that such interpretation may vary from

[1] *For. Rels. of U. S.,* 1899, p. 741. This interpretation of the most-favored-nation clause has been sanctioned, not only by the executive department, but also by the courts. Thus the Supreme Court has held that such a clause in our treaty of 1858 with Denmark does not require us to extend to that country without compensation privileges which we conceded, in exchange for valuable concessions, to the Hawaiian Islands by the treaty of 1875. Bartram *v.* Robertson, 122 U. S., 116.

[2] *Ibid.,* 746-8.

one administration to another. Thus in the case of the act of Congress of 1912 exempting our coastwise vessels from the payment of tolls on going through the Panama Canal, Secretary Knox, in notes to the British Government, argued that this provision was not a violation of the Hay-Pauncefote Treaty, and President Taft took the same position. "After full examination of the Hay-Pauncefote treaty," said the President, "I feel confident that the exemption of the coastwise vessels of the United States from tolls and the imposition of tolls on vessels of all nations engaged in the foreign trade is not a violation of the treaty."[1] Within two years, however, President Wilson declared in an address to Congress that the exemption of our coastwise vessels "is in plain contravention of the [Hay-Pauncefote] treaty." We should not, he added, interpret "with a too strained or refined reading the words of our own promises just because we have power enough to give us leave to read them as we please. . . . We ought to reverse our action without raising the question whether we were right or wrong."[2] At Wilson's solicitation, Congress passed an act which repealed the measure of 1912 in so far as it granted exemption to our vessels.[3]

The variation in the interpretations thus placed upon the treaty is to be ascribed mainly to the fact that such interpretations were made by the political departments of the Government. Had the treaty provisions in this instance been subjected to judicial interpretation, such variation would have been highly improbable, on account of the greater permanency of the judiciary and the operation of the rule of *stare decisis*.

[1] House doc. 914, 62d Cong., 2d sess., p. 1 (August 19, 1912), and cf. Sen. doc. 11, 63rd Cong., 1st sess.

[2] House doc. 813, 63rd Cong., 2d sess. (March 5, 1914).

[3] 38 Stat. at L., pt. 1, p. 386. In repealing this provision, however, Congress specified that its action should "not be construed or held as a waiver or relinquishment of any right the United States may have under the treaty . . . to discriminate in favor of its vessels" in the matter of tolls.

JUDICIAL INTERPRETATION

The Constitution provides that the judicial power vested in the courts of the United States shall extend to all cases in law and equity arising under treaties made under United States authority;[1] and, as already pointed out, in cases involving the construction of a treaty the Supreme Court has jurisdiction by way of appeal or writ of error from the decisions of the federal district courts and from those of the highest court of any state.[2] In exercising such power, it may easily become necessary for the courts to say what given treaties mean. It is not always feasible, however, to bring before the courts for adjudication the provisions of treaties about whose interpretation there is doubt. Thus the question whether a correct interpretation of the treaty of alliance with France permitted us to remain neutral in 1793 was not one upon which the courts are competent to pass, since it is a political question and involves a matter of public political policy. Many treaties are of a strictly public character, pledging the contracting powers to take certain action in their governmental capacity upon the arising of a given contingency; and the question whether a particular circumstance is such a contingency as to require the action contemplated by the treaty is political in its nature, and the courts will not undertake to decide it. When a treaty stipulates action on the part of one of the contracting parties in its governmental capacity, and an allegation of non-performance of the stipulation gives rise to a dispute between the parties as to the correct interpretation of the treaty, this again is a political question not suitable for submission to the national courts of either party. If the question is not capable of settlement by diplomatic negotiations, it may be left to arbitration or may be regarded as

[1] Art. III, sect. 2.
[2] Judicial Code of U. S., sects. 237-8.

a *casus belli*.[1] Thus, as the Supreme Court has declared, "when the terms of the [treaty] stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."[2]

On public rights, the courts follow the political departments of the Government, both as to the interpretation of a treaty and as to whether an alleged treaty is actually in force. Thus, as already indicated, they defer to the judgment of the executive department of the Government as to whether a treaty, despite its breach by the other party, is still in force.[3] Furthermore, if Congress disregards a treaty by passing a law in conflict with it, the courts are bound to consider the treaty as no longer law of the land.[4]

When, on the other hand, treaties confer private rights on citizens or subjects of the contracting powers—rights such as are enforceable in a court of justice—the courts accept such treaties as rules of decision and place upon them their own interpretation, in so far as the treaties are self-executing, *i.e.*, in the degree in which they presently establish such rights rather than merely promise them. Thus in 1890 the question arose whether a French citizen is entitled to own, by inheritance from an American citizen, property situated in the District of Columbia. The treaty of 1853 with France granted this right only with reference to property situated in "all the states of the Union."[5] After lay-

[1] Cf. the case of our dispute with Great Britain over the seal fisheries in the Behring Sea, and see *In re* Cooper, 143 U. S., 472, and Baldwin, *American Judiciary*, 37-41.

[2] Foster *v.* Neilson, 2 Pet., 314. It results from the above reasoning that there is no conflict between treaties agreeing to international arbitration of disputes arising from the interpretation of treaties and Art. III, Sect. 1, of the Constitution providing that the judicial power vested in the courts of the United States shall extend to all cases in law and equity arising under treaties made under the nation's authority.

[3] Charlton *v.* Kelly, 229 U. S., 447.

[4] Botiller *v.* Dominguez, 130 U. S., 238; The Cherokee Tobacco, 1 Wall., 616; Head Money Cases, 112 U. S., 580; Whitney *v.* Robertson, 124 U. S., 190.

[5] Malloy, *Treaties*, etc., 531.

ing down the rule that "it is a general principle of construction with respect to treaties that they should be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them," the Supreme Court proceeded to construe the clause in question to be broad enough to include the District of Columbia.[1]

In cases in which private rights are involved a prior executive interpretation of a treaty would not be considered necessarily binding upon the courts;[2] nor, in such cases, would the courts decline to give effect to treaty provisions establishing private rights, even though the judicial constructions were resisted by the political department of the government in argument before the court.[3] On the other hand, when private rights have been determined by the Supreme Court through the interpretation of a treaty, the executive department of the Government considers such interpretation conclusive as to the treaty's meaning.[4]

TREATY SPECIFICATION OF METHOD OF INTERPRETATION

Treaties sometimes contain provisions indicating the meaning or interpretation of any of their terms which would otherwise be doubtful or ambiguous. Such interpretative provisions are sometimes inserted by the Senate with a view to indicating the understanding of that body as to the meaning to be attached to the terms of a treaty for whose ratification its advice and consent is asked. If such Senate "reservations" are accepted by the President and by the other contracting party, they become as valid and binding as any

[1] De Geofroy *v.* Riggs, 133 U. S., 258, at p. 271. The court found support for this construction in an act of Congress. Cf. Tucker *v.* Alexandroff, 183 U. S., 424, where the court declared that "a convention in a treaty which is operative upon both signatory powers and is intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose."

[2] *For. Rels. of U. S.*, 1910, p. 732.

[3] *The La Ninfa*, 75 Fed., 513; Baldwin, *American Judiciary*, 40.

[4] See Maiorano *v.* B. & O. R. R. Co., 213 U. S., 268, and *For. Rels. of U. S.*, 1910, p. 666.

other terms of the treaty.[1] Some of the proposed Senate reservations to the Treaty of Versailles (including the Covenant of the League of Nations) were interpretations indicating the meaning which the Senate attached to certain of the treaty's provisions.[2] The same may be said of Senate reservations to other treaties and general international conventions, such as those of the Hague and Algeciras. In order to be binding as parts of a treaty, such reservations must be accepted by the President, and also by the other contracting party, or parties, although in the latter case consent may be given only tacitly. An interpretative declaration made by the secretary of state and the representative of the foreign government at the time of the exchange of ratifications of a treaty, if not submitted to or accepted by the President and the Senate, will not necessarily be considered binding upon our Government.[3]

Treaties sometimes contain provisions indicating the method to be pursued in settling any dispute which may arise as to their interpretation. Thus the convention of

[1] Thus in advising and consenting to the Korean treaty of 1882 the Senate passed a resolution stating its understanding of the meaning of a clause in the instrument, and requesting the President to communicate such interpretation to the Korean government, on the exchange of ratifications, as the sense in which the United States understood the same (Malloy, *Treaties*, I, 340). This was done; the interpretation was accepted by the Korean representative (*For. Rels. of U. S.*, 1883, p. 242); and it was thereupon embodied in the President's proclamation of the treaty (23 Stat. at L., 725). Cf. a similar case of Senatorial interpretation in the Danish treaty of 1916 (39 Stat. at L., 1716-17), and the proposed reservations to the treaty of Versailles.

[2] For example, the reservation which provided that, in the event of withdrawal from the League, the United States should be the sole judge as to whether all of its international obligations and all of its obligations under the Covenant had been fulfilled. Cong. Record, Nov. 19, 1919, vol. 58, p. 9289.

[3] A case of this sort occurred in connection with the Clayton-Bulwer treaty of 1850. On the exchange of ratifications Bulwer filed in the State Department a declaration that the treaty was made on the part of the British government on the understanding that it did not apply to the British settlement at Honduras. Secretary Clayton answered that he so understood the treaty, but that he must not be understood either to affirm or to deny the British title in that region. The declaration was not made to or accepted by the President and Senate. Consequently, in spite of it, Secretary Frelinghuysen maintained in 1882 that Great Britain had no right to exercise dominion anywhere in Central America, and that if she continued to do so, the treaty was voidable at the pleasure of the United States. *For. Rels. of U. S.*, 1882, p. 276; Moore's *Digest of Internat. Law*, V, 206.

1916 in which Denmark ceded the Danish West Indies to the United States provided: "In case of difference of opinion arising between the high contracting parties in regard to the interpretation or application of this convention, such differences, if they cannot be regulated through diplomatic negotiations, shall be submitted for arbitration to the permanent court of arbitration at the Hague." [1]

Again, special treaties have sometimes been entered into with a view to providing a means of interpreting treaties in general. Thus in 1908 we entered into several arbitration conventions in which we undertook to submit, by special agreement, to the permanent court of arbitration at the Hague such international differences as were of a legal nature or related to the interpretation of treaties between the contracting parties, and could not be settled by diplomacy.[2]

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[1] 39 Stat. at L., pt. 2, p. 1714.

[2] See, *e.g.*, Malloy, *Treaties*, etc., 814. The United States has frequently resorted to arbitration to settle disputes involving the interpretation of treaties. A leading instance is the North Atlantic Coast Fisheries Arbitration, which had for its object to determine the meaning of the phrase "coasts, bays, harbors, and creeks" in British North America, as employed in our treaty with Great Britain in 1818 to denote the places where the right of the inhabitants of the United States to fish was recognized. For the proceedings in this arbitration before the Hague court, see Senate doc. 870, 61st Cong., 3d sess. (12 vols.), and for a brief account see a paper by Robert Lansing, of counsel for the United States, in *Proceedings of the Lake Mohonk Conference on International Arbitration*, 1911, pp. 242-9. For other examples, see Moore's *International Arbitrations*.

CHAPTER XIII

THE TERMINATION OF TREATIES

IN taking up the various methods by which treaties may be terminated the fact must continue to be borne in mind that a treaty may be considered from two points of view, *viz.*, as an international contract and as a law of the land. These aspects are two sides of the same shield and cannot be wholly dissociated. Whether looked at from the internal or from the external point of view, however, the normal method of terminating a treaty which contains no provision for its own termination is the exercise of the same power that made the treaty in the first place. This is sometimes effected by making a new treaty expressly repealing or superseding a former one. Thus the Hay-Pauncefote treaty of 1901, entered into for the purpose of facilitating the construction of a trans-isthmian canal, expressly superseded the Clayton-Bulwer treaty of 1850 relating to the same matter.[1] Again, by the treaty of 1902 with Spain all "treaties, agreements, conventions and contracts" made by the United States with that country prior to the Treaty of Paris were, with the exception of the claims convention of 1834, "expressly abrogated and annulled."[2] A treaty of 1857 with Japan provided that Americans committing offenses in that country should be tried by the American consul and punished according to American laws. This provision was not superseded by the treaty of the following year;[3] but in 1899, under the terms of a treaty of 1894, the extra-territorial jurisdiction of American consuls over

[1] Malloy, *Treaties*, etc., 782.

[2] *Ibid.*, 1710. To some extent these prior treaties had already been destroyed, or at least suspended, by the war of 1898.

[3] Ross *v.* McIntyre (*In re* Ross), 140 U. S., 453.

the offenses of Americans in Japan was terminated.[1] In 1911 the treaty of 1894 was, in turn, superseded by a new treaty.[2]

A treaty may be terminated, not only by an express repeal contained in a later treaty, but by the making of a later treaty containing provisions which are inconsistent with those of the earlier instrument. In such a case the later evidence of the will of the treaty-making body prevails over the earlier. Thus the Webster-Ashburton treaty of 1842 superseded our treaty of 1827 with Great Britain, in so far as it was inconsistent with the terms of that instrument.[3] Treaties are also usually regarded as terminated when one or more of the contracting parties becomes extinct through dissolution or absorption by another state. In the latter case the termination is sometimes recognized by a new treaty with the absorbing state; and of course some or all of the provisions of the extinguished treaty may be continued. Thus by a treaty of 1904 with France the United States renounced the right of invoking the stipulations of the treaties of 1797 and 1824 with Tunis.[4] As will be observed, these instances of the termination or supersession of one treaty by another arise primarily from the view of a treaty as an international compact.

Treaties may also come to be regarded as terminated for the reason that their provisions have been fully executed. An example is a treaty for the cession of territory for a given compensation, when the transfer of sovereignty over

[1] Malloy, *Treaties*, etc., 1035.

[2] Garfield Charles, *Treaties, Conventions*, etc., Sen. doc. 1063, 62nd. Cong., 3rd sess., p. 77.

[3] For other examples, see *Notes to Treaties and Conventions between the United States and Other Powers, 1776-1887* (1889), p. 1236; Moore, *Digest of Internat. Law*, V, 363-4.

[4] Malloy, *Treaties*, etc., 545. France, upon annexing Madagascar in 1896, intimated that the maintenance of treaties between the United States and the African island was inconsistent with the new order of things, but that she would extend to Madagascar "the whole of the conventions applicable to the government or citizens of the United States in France and in French possessions." Moore, *Digest of Internat. Law*, V, 347.

the territory has been made and the sum agreed upon has been paid.

Although some early treaties were on their face permanent, if not perpetual, comparatively few stipulating obligations of continuing validity are now made which do not contain some provision for their termination or modification. Some run for a term of years, at whose expiration they automatically lapse unless expressly renewed. Others are terminable within a certain time after due notice is given; and either party may give such notice, in some cases, at any time after the treaty has gone into effect and in others, upon the expiration of a stipulated term of years. This method of termination is called a "denunciation."

As a rule, a treaty does not itself designate the officer or organ of our Government in whom is vested the authority to give the stipulated notice, for this is a matter of municipal law and not an appropriate subject of international agreement. Naturally, therefore, there has been some difference of opinion as to what officer or agency is to be regarded as possessing the power. It falls, of course, to the President, or the secretary of state or other agent acting under the President's orders, to transmit the notice; for the executive is the only branch which has the right to carry on correspondence with foreign governments. But the important question remains whether the President may act on his own initiative and authority in giving such notice, or whether he can act only when authorized by Congress, or perhaps by the Senate.

TERMINATION BY EXECUTIVE ACTION

In at least one instance the President acted on his own initiative and without authorization or ratification by any other branch of the Government. This occurred in 1899, when, in view of the construction placed by Switzerland upon the most-favored-nation clauses of our treaty of 1850

with that country, Secretary Hay instructed our minister at Berne to deliver to the President of the Swiss Confederation notice of our intention to arrest the operation of those clauses of the treaty; and such notice of denunciation was accordingly delivered and accepted.[1]

Occasionally the President has taken the initiative in denouncing a treaty, but his act has subsequently been approved or "ratified" by a joint resolution of Congress. In 1911 the failure of Russia to give protection, under the terms of our treaty of 1832 with that country, to American citizens of Hebrew descent residing therein and holding duly issued American passports, led our Government to denounce the treaty mentioned, in accordance with its provisions. A joint resolution for this purpose, couched in terms which were unacceptable to the President, passed the House of Representatives. Before it was acted upon by the Senate, however, the Secretary of State, by order of the President, directed our ambassador at St. Petersburg to notify the Russian Government of our intention to terminate the treaty. This notification was delivered on December 17, and on the following day President Taft addressed a message to the Senate informing that body of his action and stating: "I now communicate this action to the Senate, as a part of the treaty-making power of this Government, with a view to its ratification and approval."[2] The President's course indicated his belief (1) that he had a right to notify the foreign government of the denunciation of the treaty prior to any action by the Senate or by Congress authorizing him to do so; but (2) that subsequent approval by the Senate, as a part of the treaty-making power, was desirable, if not necessary; and (3) that the concurrence of the House of Representatives was unnecessary. The resolution which was finally passed, however, as a substitute

[1] *For. Rels. of U. S.*, 1899, pp. 754-7. Cf. Crandall, *Treaty-Making and Enforcement*, 642.

[2] Cong. Record, December 18, 1911, vol. 48, p. 453; House rept. 179, 62d Cong., 2d sess.; Sen. doc. 161, 62d Cong., 2d sess.

for the original House resolution, and accepted by the President was a joint resolution, which said simply that "the notice thus given by the President to the Government of Russia to terminate said treaty . . . is hereby adopted and ratified."[1] Since a joint resolution, as distinguished from a concurrent resolution, must be signed by the President, unless passed over his veto by a two-thirds vote, it follows that, in such a case, the President participates in approving his own act, although he cannot, in a strictly legal sense, take the initiative in doing so.

A case which throws light upon the location of the power of denunciation arose during the Civil War in connection with the Rush-Bagot convention of 1817 limiting our naval armament on the Great Lakes. In 1864 the House of Representatives passed a joint resolution with a view to terminating this arrangement. A few months later, and before any action had been taken on the resolution by the Senate, Secretary Seward instructed our ambassador at the court of St. James to give the required six months' notice of termination. Four months after this notice was served Congress passed and the President approved a joint resolution which stated that the notice given by the President "is hereby adopted and ratified as if the same had been authorized by Congress." A month later, however, despite this legislative sanction of the executive notification of termination, our ambassador at London, acting under instructions from the Secretary of State, notified the British Government of our withdrawal of the previous notice of termination; and the agreement has since been considered by both governments as having continuing force and effect.[2] It does not appear that the executive notice of withdrawal of the previous notice of termination received any legislative sanction, or that the ratification by Congress of the notice of termina-

[1] 37 Stat. at L., pt. 1, p. 627. See also Taft, *Chief Magistrate and His Powers*, 116-7; *For. Rels. of the U. S.*, 1911, pp. 695-9.

[2] J. W. Foster, *Report on the Rush-Bagot Agreement*, Senate Exec. Doc. 9, 52d Cong., 2d sess., pp. 24-32.

tion was ever rescinded, or, finally, that these circumstances were ever regarded by either government as affecting the validity of the withdrawal. Should Congress, however, enact legislation inconsistent with the terms and spirit of the agreement, a different question would be presented.

TREATY SPECIFICATION OF METHOD OF TERMINATION

The question may be raised whether the method of giving notice by our Government of the termination of a treaty may be indicated in the treaty itself. Is this a matter which the treaty-making power is competent to determine? Two things can be said. The first is that the method of notice is part of the internal arrangements of our Government and is not, therefore, an appropriate subject for treatment in an international instrument. The second is that, nevertheless, there is no legal obstacle to covering the matter in a treaty, provided, of course, that no attempt is made to lodge the power of giving notice of termination in the hands of an organ or branch of the Government which is not constitutionally competent to exercise it.

Article I of the Covenant of the League of Nations provides that any member may, after two years' notice of its intention to do so, withdraw from the League, provided it has fulfilled its international obligations and its obligations under the Covenant. The majority of the Senate voted in favor of a reservation to this provision which purported to confer discretionary power upon the two houses of Congress to give such notice by concurrent resolution. This reservation was perhaps not necessarily an attempt—on the supposition that concurrent resolutions need not be signed by the President [1]—to exclude him from participation in the procedure of withdrawal. But it was at least an effort to provide, through the exercise of the treaty power,

[1] Although apparently not in accordance with the Constitution, it is established by custom that in cases not involving legislation concurrent resolutions need not be signed by the President.

an alternative method of terminating the treaty of peace, in so far as that instrument concerned our membership in the League of Nations. The President could certainly not thus be stripped, even with his consent, of any constitutional power that he may have of effecting the termination of a treaty, and such a concurrent resolution would have no international validity if he were opposed to the policy involved. It would merely inform him of the wishes of Congress, which he could not be compelled against his will to carry out. Otherwise, hopeless confusion would result from divergent views of the two authorities upon such questions as the termination of the treaty or our withdrawal from the League.[1]

The further question arises whether it would be feasible to provide, by a stipulation in the treaty itself or otherwise, that a treaty should be terminated by notice given by a designated authority, not at any specified time, but upon the ascertainment by such authority of the existence of a certain state of facts. In the light of our constitutional law and practice, and on the analogy of the doctrine laid down by the Supreme Court in the case of Field *v.* Clark,[2] as well as by the Judiciary Committee of the Senate in its report on the proposed special treaty of 1919 with France,[3]

[1] For the Senatorial debate on the reservation, see Cong. Record, November 7-8, 1919, vol. 58, pp. 8543 ff., 8599 ff. Cf. President Wilson's letter to Senator Hitchcock, in which he said: "May I suggest that with regard to the possible withdrawal of the United States, it would be wise to give to the President the right to act upon a resolution of Congress in the matter of withdrawal? In other words, it would seem to be permissible and advisable that any resolution giving notice of withdrawal should be a joint rather than a concurrent resolution. I doubt whether the President can be deprived of his veto power under the Constitution, even with his own consent. The use of a joint resolution would permit the President, who is, of course, charged by the Constitution with the conduct of foreign policy, to merely exercise a voice in saying whether so important a step as withdrawal from the League of Nations should be accomplished by a majority or by a two-thirds vote. The Constitution itself providing that the legislative body (*sic*) was to be consulted in treaty-making and having prescribed a two-thirds vote in such cases, it seems to me that there should be no unnecessary departure from the method there indicated." Cong. Record, February 9, 1920, vol. 59, p. 2799.

[2] 143 U. S., 649.

[3] Cong. Record, Sept. 22, 1919, vol. 58, pp. 6044-5,

there would seem to be no objection to such procedure—especially if judgment or discretion is involved in the ascertainment of the existence of the given state of facts [1]—provided that the authority so designated should be the President, or the secretary of state acting under his direction, and not some inappropriate agency, such as the governor of New York, or the mayor of Chicago, or even the two houses of Congress acting alone, by mere majority vote, without the concurrence of the President. As a matter of fact, when the President acts in giving notice of the termination of a treaty, even though under legislative authorization (provided that no exact time limit is specified), he does so upon his own ascertainment of the existence of a certain state of facts, *viz.*, that the circumstances of our internal affairs, as well as of our diplomatic relations, are propitious for the giving of such notice.

The proposed special treaty with France, drawn up in 1919, provided that it should "continue in force until, on the application of one of the parties to it, the council [of the League of Nations] acting, if need be, by a majority, agrees that the League itself affords sufficient protection." The constitutionality of this treaty was affirmed by the Judiciary Committee of the Senate.[2] At first sight, this provision would seem to confer upon an international body the power of terminating, at its discretion, a treaty to which the United States is a party. The Council would doubtless have to use discretion in determining whether the League affords sufficient protection. But the action of the Council would not directly terminate the treaty nor prevent its renewal. The treaty merely adopted the date of the action of the League on this matter as the date of termination, instead of fixing a calendar date or a definite number of years of duration.

[1] Cf. the Senate debate on the reservation to the German peace treaty relating to withdrawal of the United States from the League of Nations. Cong. Record, November 8, 1919, vol. 58, pp. 8599 ff.

[2] Cong. Record, Sept. 22, 1919, vol. 58, pp. 6044-5.

TERMINATION ON CONGRESSIONAL AUTHORIZATION

On several occasions Congress, by act or joint resolution, has assumed to authorize the President to give notice of the termination of a treaty whose terms provided that it might be terminated on giving a specified notice. Thus by a joint resolution of April 27, 1846, Congress undertook to "authorize" the President, "at his discretion," to give the British Government notice of the termination of the convention of 1827 concerning the joint occupation of the Northwest territory.[1] Such action on the part of Congress had been recommended by President Polk in his first annual message.[2] In his annual message of 1854 President Pierce informed Congress that he deemed it expedient that notice be given to the Government of Denmark of the intention of our Government to terminate the Danish treaty of 1826, in accordance with its terms.[3] A few months later the Senate unanimously adopted, in executive session, a simple resolution "authorizing" the President "at his discretion" to give the contemplated notice; and the notice was shortly afterwards given.[4] This case differed from the one previously mentioned in that legislative authorization was given through a Senate resolution merely, and not through a joint resolution. The legality of the action taken was upheld in a report of the Senate Committee on Foreign Relations.[5] A joint resolution approved January 18, 1865, stipulated that notice be given of the termination of the Canadian reciprocity treaty of 1854 with Great Britain, in accordance with its provisions, and the President was charged with the communication of such notice to the

[1] 9 Stat. at L., 109; Malloy, *Treaties*, etc., 644.
[2] Richardson, *Mess. and Pap. of the Presidents*, IV, 395.
[3] Richardson, *op. cit.*, V, 279.
[4] Richardson, *op. cit.*, V, 334; Reports of Senate Committee on For. Rels., Sen. doc. 231, 56th Cong., 2d sess., VIII, 107-8; Bartram *v.* Robertson, 122 U. S., 116; *Sen. Exec. Journal*, IX, 431.
[5] Sen. doc. 231, *loc. cit.* See also *ibid.*, VIII, p. 66; Sen. rept. 195, 34th Cong., 1st sess., Sen. rept. 97, 34th Cong., 1st sess., reprinted in Cong. Record, vol. 58, Nov. 8, 1919, p. 8126.

British Government.[1] Legislative authorization, it should be observed, can be given by act as well as by joint resolution. Thus in the Seamen's Act of 1915 Congress "requested and directed" the President to give notice of the termination of certain treaty provisions in conflict with the measure.[2]

The question may be raised as to the extent of the binding force of such legislative provisions. Is the President bound to give notice of termination when directed by Congress to do so? Practical considerations connected with the expediency of maintaining harmonious relations between the executive and legislative branches, as well as between our Government and other governments, may require the President to give the specified notice. Where the President is unable to enforce a treaty as law of the land without the coöperation of Congress, and Congress not only does not coöperate, but passes legislation in conflict with the treaty, the President is practically bound in the international sense, and legally bound in the municipal sense, to consider the treaty terminated and to notify the foreign governments accordingly. Thus in the case of the Seamen's Act of 1915 the President was placed under practical compulsion to give the required notices, and under legal compulsion to consider the treaty provisions in question terminated as law of the land, since the act contained provisions conflicting with the treaty stipulations. If the notices had not been given, the conflicting treaty stipulations would have been abrogated as law of the land by unilateral legislative act on our part without notice to the other contracting parties, who would then have had just ground for complaint against us.

On account of the special power of Congress over the

[1] 13 Stat. at L., 566. U. S. Tariff Commission: *Reciprocity and Commercial Treaties* (1919), pp. 23, 74. Cf. a similar instance of the termination of the Belgian treaty of 1858, 18 Stat. at L., 287; *For. Rels. of U. S.*, 1874, p. 64, and cf. resolution for termination of Hawaiian reciprocity treaty, Senate doc. 206, 57th Cong., 2d sess., p. 8.

[2] 38 Stat. at L., pt. 1, p. 1184.

regulation of commerce and custom duties, this general situation is especially likely to arise in connection with the termination of commercial agreements. In 1909 Congress provided in the Payne-Aldrich tariff act that the President should "have power" and that it should be "his duty" to notify the foreign governments with which we had commercial agreements, authorized by the Dingley tariff act of 1897, of the termination of such agreements in conformity with their terms.[1] After the act was passed the Secretary of State, who had already sent out preliminary notices, definitively notified a number of foreign governments of the intention of our Government to terminate these agreements;[2] and when the French government protested, the acting Secretary of State replied: "As you are aware, the President of the United States, in giving the formal notices on August 7, 1909, has been obliged to follow implicitly the prescriptions of the new tariff act of the United States."[3]

Although the President may thus be practically compelled to give the specified notice, from the legal point of view the situation is somewhat different. Even if Congress should enact a law directing the President to give notice of the termination of a treaty, and should pass it over his veto by a two-thirds vote, there would be no means of legally forcing the execution of the mandate—at all events, none short of impeachment. If, indeed, the President could be legally compelled to execute such a mandate, he would sink into the position of a mere ministerial agent of Congress, without discretion in conducting this phase of our foreign relations. It can hardly have been the intention of the framers of the Constitution that he should occupy such a position. This, of course, is not equivalent to either affirming or denying that the President could, in every case, act on his own initiative in terminating a treaty by notice to that effect in

[1] 36 Stat. at L., pt. 1, p. 83; Malloy, *op. cit.*, 542.
[2] *For. Rels. of U. S.*, 1909, pp. 46, 248, 270, 288, 389, etc., U. S. Tariff Commission, *Reciprocity and Commercial Treaties*, pp. 31, 227-8.
[3] *For. Rels. of U. S.*, 1909, p. 251.

accordance with its terms, without waiting for legislative authorization.

Congress has sometimes undertaken not only to direct the President to give notice of the termination of a treaty but also to specify the time within which, or the date on which, the notice shall be given. Thus in the Seamen's Act already referred to the President was directed to give the specified notice within ninety days after the passage of the act, while by the tariff act of 1909 he was directed to give the required notices to foreign governments within ten days after the passage of the act. In a joint resolution of March 3, 1883, Congress, after declaring that certain sections of the treaty of 1871 between the United States and Great Britain ought to be terminated at the earliest possible time, directed the President to communicate the proper notice to the British Government on the first day of July following, or as soon thereafter as might be.[1] The first day of July of that year fell on Sunday, and the notice was officially communicated on the following day.[2] As a matter of comity, the President may thus comply with the directions of Congress as to the time of giving notice. But if he cannot legally be compelled to give notice at all, it follows that he cannot legally be forced to give it at or within any specified time. Unless he acts promptly, Congress may withdraw the authorization. But if the authorization was not essential in the first place withdrawal of it would be without legal effect.

This question of the power of Congress to compel the President to terminate treaties was brought up prominently by the action of President Wilson in making public his intention not to comply with the provision of section 34 of the Merchant Marine Act of June 5, 1920, which "authorized and directed" him "within ninety days after this act becomes law to give notice to the several governments, respectively parties to such treaties or conventions, that so

[1] 22 Stat. at L., 641.
[2] *For. Rels. of U. S.*, 1883, pp. 414, 441.

much thereof as imposes any restriction on the United States (as to discriminatory custom duties and tonnage dues) will terminate on the expiration of such periods as may be required for the giving of such notice by the provisions of such treaties or conventions."[1] It has been argued that the President could have been compelled by Congress to give the notice of termination specified by this act by virtue of its power to regulate foreign commerce and to pass all laws necessary and proper to carry into execution its other legislative powers and all other powers of the Government.[2] If, however, this view is correct, it would be equally true that, in the exercise of such powers, Congress could compel the President and Senate to make treaties which it should consider necessary and proper for the regulation of foreign commerce. But it will hardly be contended that Congress can do this. Congress could, of course, terminate the treaties as law of the land by passing conflicting legislation which the President would be bound to enforce; but the international validity of the treaties would not be thereby affected. The notices which, in the act of 1920, Congress directed should be given did not provide for the termination of the treaties in their entirety, but only of such portions as laid the United States under an obligation not to impose discriminatory duties. As the treaties were reciprocal in character, it would hardly be supposed that the foreign nations concerned would be willing to allow the United States to relieve itself of its obligations under them without availing themselves of a similar privilege. The action of Congress was aimed, however, as far as the express provisions went, only at the partial termination of the treaties. But the notices were not given as required in the act.

When Congress attempted in 1879 to secure the partial abrogation of a treaty with China, President Hayes, in veto-

[1] 41 U. S. Stat. at L., 1007; *New York Times*, September 25, 1920.
[2] *Weekly Review*, October 6, 1920, p. 282.

ing the bill, said: "As the power of modifying an existing treaty, whether by adding or striking out provisions, is a part of the treaty-making power under the Constitution, its exercise is not competent for Congress, nor would the assent of China to this partial abrogation of the treaty make the action of Congress in thus procuring an amendment of a treaty a competent exercise of authority under the Constitution. The importance, however, of this special consideration seems superseded by the principle that a denunciation of a part of a treaty not made by the terms of the treaty itself separable from the rest is a denunciation of the whole treaty."[1]

TREATIES CONTAINING NO PROVISION FOR TERMINATION

We have been considering treaties which contain provisions for their own termination, as most treaties now do. The United States has, however, at times entered into treaties which, lacking any provision of this kind, were, on their face, permanent, or even perpetual. Of this character was the Clayton-Bulwer treaty of 1850 with Great Britain concerning a trans-isthmian canal. About thirty years after this treaty was made, however, the United States became dissatisfied. Secretary Blaine characterized the instrument as a compact "misunderstandingly entered into, imperfectly comprehended, contradictorily interpreted, and mutually vexatious,"[2] and argued plausibly that, in view of the remarkable development of the United States on the Pacific Coast, together with other changes that had taken place, the treaty, on the principle of *rebus sic stantibus*, should be modified, if not considered terminated.[3] This view was not accepted by the British Government, but the

[1] Richardson, *Mess. and Pap. of the Presidents*, VII, 519.

[2] *For. Rels. of U. S.*, 1881, p. 568. Cf. Report of the House Committee on Foreign Affairs on a House resolution requesting the President to abrogate the Clayton-Bulwer treaty. House rept. 1121, 46th Cong., 2d sess. (1880), and Bigelow, *Breaches of Anglo-American Treaties*, Chaps. IV and V.

[3] *Ibid.*, 554-9; Henderson, *American Diplomatic Questions*, 144 ff.

agitation continued, and in 1891 the Senate committee on foreign relations unanimously declared that, in its opinion, the convention of 1850 had become obsolete.[1] After the Spanish-American war some hotheads in the lower house of Congress were in favor of abrogating or repealing the treaty outright. Wiser men in the administration and in the Senate recognized, however, that the honorable method of securing release from a treaty which is on its face perpetual is to make a new treaty superseding it. Resolutions were accordingly introduced in the Senate requesting the President to open negotiations with Great Britain looking to the modification or abrogation of the objectionable compact.[2] The negotiations were instituted, and in 1901 the Hay-Pauncefote treaty, as has been indicated, superseded, in express terms, the earlier agreement.[3]

CONGRESSIONAL TERMINATION OF TREATIES AS LAW OF THE LAND

When, as in the case just mentioned, a treaty provides no method for its own termination, but is on its face perpetual, the President cannot, by his sole act, terminate it either as an international compact or as a law of the land. It can be terminated absolutely, *i.e.*, both internationally and municipally, only by the making of a new treaty superseding the earlier one;[4] although it may be terminated in its aspect merely as law of the land by an act of Congress. Such an act may provide expressly for the abrogation of the treaty as law of the land, or it may abrogate it indirectly, *e.g.*, through necessary implication of conflicting

[1] Sen. rept. 1944, 51st Cong., 2d sess., pp. 4-5.

[2] Cong. Record, December 8, 1898, vol. 32, p. 55; *ibid.*, December 13, 1900, vol. 34, p. 265.

[3] See *History of Amendments Proposed to the Clayton-Bulwer Treaty*, Senate doc. 746, 61st Cong., 3rd sess., 1911; *Diplomatic History of the Panama Canal*, Senate doc. 474, 63rd Cong., 2d sess., 1914; also Senate doc. 456, 63rd Cong., 2d sess.

[4] Except that, in some cases, it can be terminated in both aspects by a Congressional declaration of war.

or inconsistent legislation. The only instance of express abrogation occurred in 1798, when, after declaring that the treaties of 1778 between the United States and France had been repeatedly violated by the French Government, and that, in spite of our remonstrance, that Government continued to pursue against the United States "a system of predatory violence, infracting the said treaties and hostile to the rights of a free and independent nation," Congress enacted that the United States "are of right freed and exonerated from the stipulations" of such treaties, and that "the same shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States." [1]

By basing the termination of the treaties on the adverse breach by France and declaring them no longer obligatory on the Government of the United States, the language of this act gave evidence of the intention of Congress to terminate the treaties, not only as law of the land, but also as international compacts. That such was the effect of the act was held by the Court of Claims of the United States, which declared that "a treaty which on its face is of indefinite duration and which contains no clause providing for its termination may be annulled by one of the parties under certain circumstances. As between the nations it is in its nature a contract, and if the consideration fail, for example, or if its important provisions be broken by one party, the other may, at its option, declare it terminated. . . . We are of opinion that the circumstances justified the United States in annulling the treaties of 1778; that the act was a valid one, not only as a municipal statute but as between the nations; and that thereafter the compacts were ended." [2] The contention that the act of Congress was a valid international abrogation of the treaties was not, however, ac-

[1] 1 Stat. at L., 578; Moore, *Digest of Internat. Law*, V, 356; J. B. Scott [ed.], *The Controversy over Neutral Rights between the United States and France, 1797-1800*, 65.

[2] Hooper *v.* United States, 22 C. Cls., 408; J. B. Scott [ed.], *The Controversy over Neutral Rights between the United States and France, 1797-1800*, 350-405.

quiesced in by the French Government, and two years afterwards that Government's position in the matter was apparently to some extent recognized as just by the United States.[1]

In this case Congress assumed to decide that the adverse breach was sufficient cause for considering the treaties terminated. The act in question, however, together with other measures passed about the same time, may be considered as having constituted a declaration of partial war or limited hostilities;[2] and the treaties may be regarded as having been terminated on account of the declaration and existence of such a state of hostilities.[3]

TERMINATION BY ADVERSE BREACH

That Congress has at least a qualified right to pronounce a treaty terminated on account of adverse breach was apparently recognized by President Grant in 1876, when, in a message to Congress, he declared that the action of Great Britain in requiring the agreement of the United States to conditions[4] not provided for in the extradition article of the Webster-Ashburton Treaty of 1842 before surrendering fugitives from justice, "if adhered to, cannot but be regarded as the abrogation and annulment of the article of the treaty on extradition." Continuing, he said: "It is for the wisdom of Congress to determine whether the article of the treaty relating to extradition is to be any longer regarded as obligatory on the Government of the United States or as forming part of the supreme law of the land." But he then added: "Should the attitude of the British

[1] Moore, *Digest of Internat. Law.* V, 357-8.

[2] Bas *v.* Tingy, 4 Dall., 37; Talbot *v.* Seeman, 1 Cranch, 1, reprinted in J. B. Scott [ed.], *The Controversy over Neutral Rights between the United States and France, 1797-1800,* 104-152.

[3] Cf. Corwin, *National Supremacy,* 79.

[4] *Viz.,* that the United States agree that persons extradited from Great Britain should not be tried in the United States for offenses other than those for which extradition had been demanded.

Government remain unchanged, I shall not, without an expression of the wish of Congress that I should do so, take any action either in making or granting requisitions for the surrender of fugitive criminals under the treaty of 1842."[1] Thus, while asserting that it is for Congress to determine whether a treaty provision is still binding on our Government, the President, in the next breath, assumes that, in the absence of any pronouncement by Congress on the matter, he has the right to consider the treaty provision terminated by declining to enforce it.[2]

In other cases the Executive has assumed to exercise a concurrent, if not an exclusive, power to decide that events happening outside of our jurisdiction have had the effect of terminating treaties to which we were a party. Thus in 1815 Monroe, while secretary of state, notified the Dutch minister that treaties between the United States and some of the European powers, including the treaty of 1782 with the Netherlands, had been annulled "by causes proceeding from the state of Europe for some time past."[3]

When a foreign government with which the United States has a treaty notifies our Government of the termination of the treaty in accordance with its provisions, or when a third power absorbs a country with which the United States has treaties and notifies our Government of the termination of such treaties by virtue of that fact, such notification of termination is received and acquiesced in by the Executive, and no action by the legislative department is necessary to effectuate the termination. Thus in 1897 the secretary of state accepted on behalf of our Government the denunciation of a treaty by the Dominican Republic and declared

[1] Richardson, *op. cit.*, VII, 372-3, 414-6; *For. Rels. of the U. S.*, 1876, 204-309; Moore, *Digest of Internat. Law*, V, 321-2. The operation of the treaty was suspended for six months and then revived. For the diplomatic correspondence in the case, see House Exec. Doc. 173, 44th Cong., 1st sess. (1876).

[2] It should be remembered, however, that the treaty provision in question was susceptible of termination upon notice.

[3] *For. Rels. of the U. S.*, 1873, II, pp. 715-6, 720-7; Moore, *Digest of Internat. Law*, V, 344-5.

the treaty terminated by virtue of that act.[1] Again, when Madagascar was definitely absorbed by France in 1896 our State Department, on being notified of the fact of the establishment of French control in the island, recognized the termination of our consular treaty with Madagascar by instructing our consuls there to discontinue the operations of American consular courts provided for by the now obsolete treaty.[2] That the Executive department is competent to decide whether the breach of a treaty by the other contracting party is sufficient to terminate it was indicated by the Supreme Court in the Charlton extradition case, when it said: "The Executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant."[3]

THE COURTS AND POLITICAL QUESTIONS

As indicated in the decision just cited, the courts follow the determinations of the political departments of the Government when passing upon the question whether a treaty has been terminated by adverse breach or other cause or is still in force. In the Charlton case the political department whose determination was held binding on the court was the executive. But in other cases the courts have similarly followed the legislature for the very good reason that this authority determines the law of the land, within the limits of the Constitution, even to the extent of abrogating treaties. As the lower court remarked in the Charlton

[1] *For. Rels. of U. S.*, 1897, p. 126.

[2] *Ibid.*, 1896, pp. 123-4. Cf. Mahoney *v.* U. S., 10 Wall., 62, where the court recognized that our treaty of 1816 with Algiers expired when that country was absorbed by France in 1830. The court followed the construction placed by the State Department upon the act of Congress of 1810 allowing salaries to consuls in certain countries, based impliedly on the assumption of the termination of the treaty of 1830 as sanctioned by later acts of Congress. Our treaty with Hanover was abrogated through its annexation by Prussia in 1867. *For. Rels. of U. S.*, 1875, p. 479.

[3] Charlton *v.* Kelly, 229 U. S., 447.

case, the option of considering the treaty terminated must be exercised by the "political departments—Congress or the treaty-making power—possibly the executive power within certain limitations; assuredly not the judiciary."[1]

Public rights accruing to the United States under the terms of a treaty may be renounced and terminated by the action of the political departments of the Government. Thus in his message of December 3, 1907, President Roosevelt asked authority of Congress to remit a portion of the Chinese indemnity accruing to the United States under the convention between the powers and China made at the conclusion of the "Boxer" troubles in 1900; and authority to do so was granted by a joint resolution of May 25, 1908, with the proviso that a certain sum should be reserved for the payment of private claims to be adjudicated by the Court of Claims.[2]

Although the question of the continuing obligation of a treaty is a political one, the courts hold that private rights which have been established by treaty survive, even though the treaty is terminated through the action of the political departments of the Government. Thus the Supreme Court held that titles to land in the United States acquired by French subjects under sanction of the treaty of 1778 were not divested by the abrogation of that treaty, or by the expiration of the convention of 1800.[3] The same court held also that the war of 1812 did not set aside the treaty of 1794 between the United States and Great Britain to the extent of depriving the British Society for the Propagation of the Gospel of property rights vesting under such treaty.[4] The

[1] *Ex parte* Charlton, 185 Fed., 880, cited by Crandall, *Treaty-Making Power*, 464. Cf. Terlinden *v.* Ames, 184 U. S., 270; Mahoney *v.* U. S., 10 Wall., 62; Hooper *v.* U. S., 22 C. Cls., 408.

[2] 35 Stat. at L., pt. 1, p. 577; Malloy, *op. cit.*, 2008; *Am. Journal of Internat. Law*, III, 451-7. A part of the sum thus remitted has been used to defray the expenses of Chinese students at American universities.

[3] Carneal *v.* Banks, 10 Wheat., 181, as summarized in Moore, *Digest of Internat. Law*, V, 373.

[4] Society, etc., *v.* New Haven, 8 Wheat., 464; Moore, *Digest of Internat. Law*, V, 372.

kind of private rights which thus continue despite the termination or suspension of a treaty has been further elucidated by the Supreme Court in the Chinese Exclusion Case as follows: "The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character." [1]

Where judicial action is necessary for enforcement, the Supreme Court might virtually terminate a treaty as law of the land by declaring it unconstitutional. This, however, has never been done, and probably would not be done except in a clear case of conflict between a treaty and the Constitution.

CONGRESSIONAL TERMINATION THROUGH CONFLICTING LEGISLATION

As previously indicated, Congress may terminate a treaty, at least in its character as a law of the land, not only by enacting a law expressly abrogating it, as was done in 1798, but also by enacting a law conflicting with, or inconsistent with, provisions of a prior treaty. When the act of Congress is constitutionally determinative of our governmental policy toward a foreign nation, and when a step by our Government is recognized in international law as having this effect, the act may terminate a treaty in its character of an international compact, as well as in that of law of the land. Thus an act or joint resolution of Congress declaring a state of war to exist with a foreign country has the effect of terminating, or at least suspending, certain kinds of treaty arrangements between the United States and that country. As Justice Curtis said on circuit, the Constitution "gives to Congress, in so many words, power to declare war, an act which, *ipso facto,* repeals all treaties

[1] 130 U. S., 581, 609, cited in Moore, *Digest of Internat. Law,* V, 372.

inconsistent with a state of war.'' [1] And the Supreme Court, speaking through Justice Miller in the Head Money Cases, declared that ''a declaration of war, which must be made by Congress, . . . when made, usually suspends or destroys existing treaties between the nations thus at war.'' [2] The question as to what treaties are inconsistent with a state of war and are terminated or suspended by the outbreak of war, and what treaties remain in force, is to some extent unsettled in international law and need not be considered here.[3] As already indicated, the question of the effect of war upon particular treaty stipulations where private rights are involved has been before the courts of the United States for adjudication. The matter has also been the subject of diplomatic representations. Thus the State Department took the ground in 1898 that not all treaties between the United States and Spain were abrogated by the war, as was held by the Spanish Government, but that those treaty provisions which were made with reference to a state of war and were expressly applicable thereto found therein their full force and effect.[4] Our Government recognized, however, that the copyright agreement of 1895 between the two countries was suspended by the outbreak of war, although it was revived, upon the proclamation of peace, without express renewal.[5]

The power of declaring treaties terminated on account of hostilities against the United States has been, with reference to Indian treaties, conferred by Congress upon the

[1] 2 Curtis, C. C. Rep. 454.

[2] 112 U. S., 580.

[3] See G. B. Davis, ''The Effects of War upon International Conventions and Private Contracts.'' *Proceedings of Am. Soc. of Internat. Law*, 1912, pp. 124-132.

[4] *For. Rel. of U. S.*, 1898, pp. 774, 972; Moore, *Digest of Internat. Law*, V, 376.

[5] Crandall, *Treaty-Making*, 451. The treaty of 1831 with Mexico was suspended by the war of 1846 with that country. The British government urged that the rights acquired by the United States under the treaty of 1783 were abrogated by the War of 1812 and did not revive automatically by a renewal of peace. The United States denied this; although the right of British subjects to navigate the Mississippi, under terms of the treaty of 1783, was not thereafter recognized.

President. "In cases where the tribal organization of any Indian tribe," says an act of July 5, 1862, "shall be in actual hostility to the United States, the President is hereby authorized by proclamation to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and legal and national obligations."[1]

Not only by an act or joint resolution declaring war, but by any legislation (if otherwise constitutional) conflicting with or inconsistent with the provisions of a prior treaty, Congress can abrogate a treaty in its character as law of the land, to the extent, at least, of such conflict. As early as 1851 Attorney-General Crittenden held that "an act of Congress is as much a supreme law of the land as a treaty. They are placed on the same footing, and no preference or superiority is given to the one or the other. The last expression of the law-giving power must prevail and have effect, though inconsistent with a prior act; so must an act of Congress have effect, though inconsistent with a prior treaty."[2] The rule thus laid down has become the settled doctrine of the courts. Thus, as the Supreme Court declared in the Head Money Cases, "so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."[3]

The treaty provisions which are most likely to be repealed as law of the land by subsequent conflicting legislation, and

[1] 12 Stat. at L., 528; R. S., sect. 2080.

[2] 5 Op. U. S. Atty.-General, 345. See also 6 *ibid.*, 291; 13 *ibid.*, 357 and report of the House Committee on Education and Labor on the bill passed in 1879 to restrict Chinese immigration, Cong. Record, January 18, 1879, vol. 8, p. 793.

[3] 112 U. S., 580. See also Taylor *v.* Morton, 2 Curtis, C. C. Rep., 454; The Cherokee Tobacco, 11 Wall., 616; Chae Chan Ping *v.* U. S., 130 U. S., 581; Fong Yue Ting *v.* U. S., 149 U. S., 698; U. S. *v.* Lee Yen Tai, 185 U. S., 213; La Abra Silver Mining Co. *v.* U. S., 175 U. S., 423; Botiller *v.* Dominguez, 130 U. S., 238. For a collection of cases on this point, with quotations from them, see *Extracts from Briefs on the Power of Congress over Treaties*, Senate doc. 487, 60th Cong., 1st sess. (1908).

capable of being so adjudicated by the courts, are those which undertake presently to establish rights of aliens in connection with entrance into and residence in the United States. Such provisions do not necessarily require auxiliary legislation for their enforcement; in the absence of conflicting legislation, they become binding on the courts in their quality as primary law of the land. When, however, alien rights are merely promised and not presently established by treaty, and it is necessary that Congressional legislation be enacted before the treaty can be enforced, it follows that Congress may practically abrogate the treaty by failure to pass the enforcement legislation, especially if the instrument specifies a time limit within which such legislation shall be passed. The effect in such a case is, to all intents and purposes, the same as the enactment by Congress of legislation conflicting with a self-executing treaty.[1]

One of the most conspicuous examples of abrogation of a treaty provision as law of the land was the annulment of the Chinese treaty of 1868 (known as the Burlingame treaty) and the supplementary treaty of 1880. In 1879 Congress passed a bill which placed restrictions on Chinese immigration into the United States and instructed the President to abrogate certain articles of the Burlingame treaty relating to that subject. President Hayes vetoed the measure, saying: "The authority of Congress to terminate a treaty with a foreign power by expressing the will of the nation no longer to adhere to it is as free from controversy under our Constitution as is the further proposition that the power of making new treaties or modifying existing treaties is not lodged by the Constitution in Congress, but in the President, by and with the advice and consent of the Senate, as shown by the concurrence of two-thirds of that body. . . .

[1] Such practical abrogation through failure to pass enforcement legislation occurred in the case of the Mexican reciprocity treaty of 1883. Congress might practically nullify a treaty providing for an international commission, such as a boundary commission, by failing to appropriate funds to pay the salaries and expenses of our commissioners.

As the power of modifying an existing treaty, whether by adding or striking out provisions, is a part of the treaty-making power under the Constitution, its exercise is not competent for Congress, nor would the assent of China to this partial abrogation of the treaty make the action of Congress in thus procuring an amendment of a treaty a competent exercise of authority under the Constitution.''[1]

In the following year a supplementary treaty with China authorized the United States to regulate, limit, or suspend the coming of Chinese laborers into the country, or their residence therein, but not absolutely to prohibit such immigration and residence.[2] In 1888, however, Congress passed an act making it unlawful for any Chinese laborers who had once lived in this country and had departed from it to return to it or remain in it.[3] The Supreme Court held that this act was in contravention of express stipulations of the treaties of 1868 and 1880, but said: ''It is not on that account invalid or to be restricted in its enforcement. The treaties were of no greater legal obligation than the act of Congress. . . . A treaty is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.''[4] The invalidation of a prior treaty by an act of Congress may give a foreign government a just ground of complaint. But such complaint, the court said, ''must be made to the political department of our Government, which

[1] Richardson, *op. cit.*, VII, 518-9. Cf. the veto by President Arthur of the bill of 1882, which he termed a breach of our international faith, because in violation of the treaty of 1880. *Ibid.*, VIII, 112.

[2] Malloy, *op. cit.*, 238.

[3] 25 Stat. at L., 504.

[4] Chae Chan Ping *v.* U. S., 130 U. S., 581.

is alone competent to act upon the subject. . . . The question whether our Government is justified in disregarding its engagements with another nation is not one for the determination of the courts." [1]

TERMINATION THROUGH LEGISLATIVE IMPLICATION

The termination of a treaty may be brought about indirectly by an act of Congress, not through a conflict between such act and express stipulations of the treaty, as in the Chinese exclusion case, but through a general inconsistency between the two instruments. Thus the act of Congress admitting Wyoming as a state was held by the Supreme Court to supersede, by necessary implication, a treaty with the Bannock Indians giving them certain hunting privileges in territory included in the new state.[2] The doctrine of abrogation by implication, however, is not held in much favor, and the intention to abrogate must plainly appear.[3]

It must be remembered, of course, that conflicting acts of Congress terminate a treaty merely as law of the land and have no effect upon its international validity. It must also be borne in mind that an infraction of a treaty does not necessarily constitute a termination of it, although an adverse breach may give the other contracting party just ground for considering the treaty at an end. As the Su-

[1] Chae Chan Ping *v.* U. S., 130 U. S., 581. In order to bring treaty stipulations more nearly in harmony with the law of the land, a treaty was concluded in 1894 which prohibited, with certain conditional exceptions, the coming of Chinese laborers to the United States for a period of ten years. Malloy, *op. cit.*, 242. Cf. an opinion that the denouncement of the treaty of 1894 opens the United States to unrestricted Chinese immigration (Sen. doc. 242, 58th Cong., 2d sess.); and see "Treaty, Laws and Rules Governing the Admission of Chinese" (Bureau of Immigration, Dept. of Labor, 1914); also Sen. Exec. doc. 54, 52d Cong., 2d sess., and "Exclusion of Chinese Laborers," Sen. doc. 162, 57th Cong., 1st sess.; also Sen. doc. 449, 59th Cong., 1st sess.; House doc. 847, 59th Cong., 1st sess.; House rept. 1231, 57th Cong., 1st sess.

[2] Ward *v.* Race Horse, 163 U. S., 504, cited in Butler, *Treaty Making Power*, II, 132-5.

[3] *In re* Chin A. On, 18 Fed., 506, cited in Moore, *Digest of Internat. Law*, V, 359.

preme Court said in the Charlton extradition case, a treaty is not abrogated by a violation of it by one of the parties, unless the political authorities of the other party choose to regard it as no longer in force.[1] In other words, the treaty is not void, but voidable. In passing acts which may be found to run counter to treaty provisions, Congress sometimes endeavors to fend off the charge of international bad faith by specifically stipulating that such treaty provisions shall not be considered as thereby terminated. Thus in the tariff act of 1913 Congress undertook to allow a five per cent discount to merchandise imported in American vessels, but with the proviso that "nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."[2] The Supreme Court held that the discount thus allowed would be inoperative as long as existing reciprocity treaties with foreign countries should remain in force.[3]

TERMINATION OF TREATIES TO WHICH THE UNITED STATES IS NOT A PARTY

We have been considering hitherto the termination of treaties to which the United States is a contracting party. When, however, one of the parties to a treaty is absorbed by the United States, treaties to which the United States is not itself a party may be terminated through the action of our Government. Thus when the Hawaiian Islands ceased to exist as an independent state through annexation to the United States, the treaties to which the Islands were a party, whether made with the United States or with other nations, were terminated. The joint resolution of Congress providing for the annexation of the Islands declared that "the existing treaties of the Hawaiian Islands with foreign

[1] 229 U. S., 447.
[2] 38 Stat. at L., 196, chap. 16, sect. IV, J., subsect. 7.
[3] United States *v.* Pulaski Co., 243 U. S., 97.

nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations."[1] Likewise, the treaties of Texas with foreign nations were, upon the annexation of that republic to the United States, terminated, in so far as they were inconsistent with the public law of this country.[2] The acquisition of the Sulu Islands in 1898 also brought to an end certain treaties in which Spain had granted to European powers commercial privileges in the archipelago.[3]

CONCLUSIONS

In view of the foregoing facts and considerations, it will be perceived that the question as to what organ of the Government is competent to terminate a treaty is not susceptible of a definite answer until the nature of the particular treaty and the surrounding circumstances are considered. It is necessary to distinguish between treaties which provide for their own termination and those that do not, and between treaties in their character as law of the land and in that as international compact. Some treaties are self-executing without further legislation, while others require auxiliary legislation before they can be enforced by the courts as law of the land. Some, such as treaties of alliance, contemplate governmental action by the political departments and are not susceptible of enforcement by the courts. These are some of the facts which must be considered in any answer to the question of what organ of the Government is competent to terminate treaties to which the United States is a party.

It has been declared that "all in all, it appears that legislative precedent, which moreover is generally supported by the attitude of the Executive, sanctions the prop-

[1] 30 Stat. at L., 750; Moore, *Digest of Internat. Law*, V, 350.
[2] Crandall, *op. cit.*, 433-4.
[3] C. E. Magoon, *Reports on the Law of Civil Government*, etc., 302, 316.

osition that the power of terminating the international compacts to which the United States is party belongs, as a prerogative of sovereignty, to Congress alone.'"[1] It cannot be maintained, however, that law and practice bear out such a sweeping statement. Some treaties may be more appropriately terminated by the President than by Congress, and *vice versa;* some may be terminated with equal effectiveness by the action of the President, or of the treaty-making body, or of Congress. Sometimes more than one method may with propriety be pursued in accomplishing the same object; although usually one method is more appropriate, that is, more in accordance with law and practice, than the others.

Without question, a mere executive agreement, which is not a full-fledged treaty, may be terminated, in so far as it is susceptible of termination at all, by the President alone, without the concurrence or approval of any other branch or organ of the Government. This is especially obvious in cases where no legislative act or treaty provision has authorized the making of the agreement, and no enforcement legislation has been passed.

Any full-fledged treaty may, of course, be superseded through a new exercise of the treaty-making power of the President and the Senate, joined with the consent of the opposite contracting party. Where a treaty provides for its own termination upon the giving of notice, such consent is given in advance for its termination upon a given contingency and without reopening negotiations. A treaty is created by the will of the treaty-making power, and if it contains a reservation by which that will may be revoked or its exercise be made to cease on a stipulated notice, it follows that the revocation is incident to the will, and that the treaty may be terminated by the President and the Senate.[2] But the further question arises whether, under

[1] Corwin, *The President's Control of Foreign Relations,* 115.

[2] Cf. Reports of the Senate Committee on Foreign Relations (Sen. doc. 231, 56th Cong., 2d sess., VIII, 111).

these circumstances, the President may give notice of termination without the concurrence of either the Senate or Congress. As is pointed out in a previous chapter, the President may be considered the final authority in treaty-making, since, even after the Senate has given its advice and consent to the ratification of a proposed treaty, he—through his power of ratifying the instrument and exchanging ratifications or failing to do so—has the option of deciding whether or not the project shall become a real treaty. It has also been shown that the President, acting on his own authority or under the authorization of the treaty-making body, may make certain kinds of executive agreements. It may therefore be argued by analogy that since the Senate has already, in its treaty-making capacity, acted upon a treaty providing for its termination upon notice, no further Senatorial action is necessary in effecting such termination, and that the President alone, as the mouthpiece of the nation in its international relations, may denounce the treaty by giving notice of its termination. This theory is supported by the action of the Executive during the Civil War in giving notice of the termination of the Rush-Bagot convention and in withdrawing such notice, in both cases prior to Senatorial or Congressional authorization, and, more recently, by the course of President Taft in 1911 in claiming and exercising the right to abrogate, by due notice, the Russian treaty prior to any action by the Senate or by the houses of Congress jointly. The theory receives still stronger support from the action of Secretary Hay in 1899 in notifying the Swiss Government of the termination of certain articles of the treaty of 1850 without prior authorization or subsequent ratification by Congress or by either branch thereof.

It is true that Congress assumed to "authorize" President Polk "at his discretion" to terminate by notice the British Convention of 1827 and that the President had requested such authorization, and it has been asserted that

this "episode clearly supports the theory that international conventions to which the United States is party must be terminated by act of Congress."[1] But it just as clearly does not establish such a theory, for, as was pointed out in a report of the Senate Committee on Foreign Relations in 1856, "the assent of both houses of Congress was certainly calculated to make the act more impressive upon England than if authorized by the Senate alone, especially as it was known that on the policy of giving the notice at all the Senate was by no means united. . . . Whilst, therefore, the committee are clear in the opinion that the right to give the notice in question pertains to the treaty-making power, they see nothing in the fact that, in the case with England, the House of Representatives acted with it, from which it is necessarily to be inferred that such union was then considered necessary to perfect the authority. But if it were so intended, the committee would not yield to the precedent."[2] It may also be recalled that while President Grant submitted to Congress the question of terminating the extradition article of the Webster-Ashburton treaty, he also claimed a concurrent power of considering the article as having lapsed without Congressional action.

Congress or the Senate may, on its own initiative, take prior action in "authorizing" the President "at his discretion" to denounce a treaty by giving notice of its termination, just as Congress or the Senate may "authorize" or request the President to negotiate a treaty, or as the Senate may consent to the ratification of a treaty already negotiated. But in all of these cases the President need not heed the request nor act on the so-called authority granted. Such action on the part of Congress or the Senate has no international validity until ratified by the President; so that, just as the President is the final authority in treaty-making, through his power of ratifying a treaty and exchanging ratifications, so is he, in general, the final

[1] Corwin, *op. cit.*, 112.
[2] Sen. doc. 231, 56th Cong., 2d sess., VIII, 111-112.

authority in the matter of denouncing a treaty, through his option of giving or withholding notice of termination and of withdrawing such notice within the time limit when given. As a matter of comity, however, and in the interest of harmonious relations between the political departments of the Government, he undoubtedly will, in most cases, endeavor to secure the formal approval of his action by Congress, or at least by the Senate. "Though the Senate participates in the ratification of treaties," says a leading writer on the constitutional law of the United States, "the President has the authority, without asking for Senatorial advice and consent, to denounce an existing treaty and to declare it no longer binding upon the United States. In important cases, however, he would undoubtedly seek Senatorial approval before taking action." [1]

When a treaty provides that it may be terminated upon notice, and the President gives such notice without authorization by Congress or the Senate, the foreign government has no right to inquire into the authority of the President to give such notice, but must assume that he is acting within his constitutional powers, and must, therefore, consider the treaty as having been terminated as an international contract through such Presidential notice. But the validity of a treaty as law of the land is dependent upon its binding force as an international compact. In other words, a treaty may be a binding international contract without being law of the land, as, for example, where Congress has acted to set it aside as such; but it cannot be law of the land when it has ceased to be a binding international compact. Therefore the act of the President in giving notice of a treaty's termination brings it to an end in both qualities or aspects. Although the President can be legally compelled by Congress to consider a treaty as having been abrogated in its character as law of the land, and can be *practically* forced by that body to denounce it to foreign governments, he

[1] Willoughby, *Constitutional Law of the U. S.*, I, 518.

cannot be legally compelled so to denounce it; while, on the other hand, he may freely denounce it if he wishes, and may thereby terminate it both internationally and municipally without the consent or approval either of Congress or of the Senate.

When a treaty lapses through self-limitation, or when it is susceptible of termination upon notice and the President transmits such notice, Congressional legislation passed for its enforcement, in so far as it is purely ancillary thereto, also lapses. In some cases, as was pointed out in a previous chapter, Congress may enact legislation for the enforcement of a treaty, which, in the absence of such treaty, would lie outside the range of its constitutional power. The operation of such legislation would, *a fortiori*, be suspended through the denunciation of the treaty by the President. The President, then, by due notice given as provided in the instrument itself, may terminate a treaty in its character of international compact and also in that of law of the land, not only when the treaty is self-executing and requires merely judicial and executive action for its enforcement, but also when legislation has been enacted for that purpose. Although he cannot, by giving such notice of termination, formally repeal valid enforcement legislation of Congress, he may render it entirely inoperative.

Without regard to whether a treaty provides for its own termination on notice, the President has power to consider it as having lapsed through adverse breach or other sufficient cause occurring outside the jurisdiction of the United States, and the courts regard themselves as bound by the Executive's determination of this matter.

When a treaty makes no provision for its own termination, the only method, in general, of bringing it to an end, both as an international compact and as law of the land, is a new exercise of the treaty-making power. In its quality as law of the land merely, however, a treaty, whether pro-

viding for its own termination or not, may undoubtedly be terminated (1) by act of Congress, either expressly abrogating it or passing legislation conflicting with it, or, (2) to all intents and purposes, by failure to enact legislation if any is needed for its enforcement. Finally, an act of Congress may terminate a treaty, both in its character of international compact and also in that of law of the land, in cases in which the Constitution confers on the two houses power to pass an act, such as one declaring war against a foreign nation, which is recognized in international law as having the effect of terminating certain kinds of treaties.

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CHAPTER XIV

NEUTRALITY AND THE MAINTENANCE OF PEACE

THE power of the President in connection with the beginning of war may be exercised either negatively or positively. By his negative power is meant the power to refrain from, or to keep the country out of, war. It may be as important, on occasion, as the power to bring on a war, although it has been given much less consideration. Congress has never declared war except in pursuance of at least a virtual recommendation of the President; and for practical purposes it may be assumed that although it has the legal power to declare war, quite independently, it will never actually take such a step without the President's approval.[1] The President's power of keeping the country out of war may be exercised in two classes of cases: first, where a situation exists in our relations with another country which might serve as a *casus belli* for the United States, but that country is not yet engaged in war, either with the United States or with any other power; and, second, where a war is in progress between other nations, and the United States refrains from entering the war on either side. The latter case is known as the policy or condition of neutrality.

Numerous instances have occurred in the history of our foreign relations in which the President, by a choice of diplomatic policies, has succeeded in keeping the country out of war. Under the Constitution, the power to change our relations with another country from those of peace to those of war is entrusted to Congress. But, as has been

[1] Even if this were not so, the President, in case an emergency arose during the recess of Congress, could, of course, postpone a formal declaration of war by failing to call a special session of that body.

stated, that body has never exercised the power except upon virtual recommendation of the President. On account of his control over the means and avenues of diplomatic intercourse, and his more intimate touch with the foreign relations of the United States, the President is usually in a better position than Congress to determine, in the first instance at least, whether a policy of peace or of war should be pursued. Congress may, of course, legally refuse to declare war when such action is recommended by the President, but it has never actually done so. On the other hand, the President may, through the exercise of his diplomatic powers, bring on a situation such that Congress would be practically compelled to declare war, whereas, by choosing the opposite path, he may keep the country out of war. Thus at the time of the Trent Affair in 1861 an unconciliatory attitude on the part of President Lincoln and Secretary Seward, or their refusal to release the Confederate commissioners, might easily have led to war with Great Britain. Again, during President Grant's administration, public opinion, both in Congress and in the country, was so inflamed against Great Britain, on account of her recognition of the belligerency of the Confederacy, her failure to prevent the *Alabama* and other Confederate ships from leaving her ports, and other grievances, that war might easily have been brought on, had not Grant and his Secretary of State, Hamilton Fish, endeavored to effect a settlement of the difficulties by diplomacy and arbitration. These efforts were successful and the differences between the two countries were settled by the award of the Alabama Claims Arbitration Tribunal at Geneva, constituted under the Treaty of Washington of 1871.[1]

Again, although President Wilson was, on different occasions, authorized by Congress to use force against Mexico, he persistently and successfully pursued the policy of avoiding a formal or full-fledged war with that country.

[1] Malloy, *Treaties*, etc., I, 701.

In this connection it should also be mentioned that, although there was considerable sentiment in Congress in favor of a declaration of war against Turkey and Bulgaria at the time of our declaration against Austria-Hungary, war was, as a matter of fact, never declared against these states, for the reason that the President did not recommend it. The explanation which he gave was that, although these states were tools of Germany, they "do not yet stand in the direct path of our necessary action." Formal war was also avoided against France in 1798 through the failure of President Adams to recommend it,[1] and President Jefferson maintained peace in 1807 with Great Britain, despite strong provocation, by not calling a special session of Congress while excitement was at its height. The President cannot usually afford to recede from the maintenance of our national rights in the face of opposition. Yet, through the exercise of skilful diplomacy, he may escape gracefully from a difficult situation without seeming to sacrifice our national honor and dignity.

Congress also, by declining to pass legislative measures in support of the bellicose attitude of the President, may assist in keeping the country out of war. The failure of France to settle the spoliation claims according to her agreement in the treaty of 1831 led President Jackson, in 1835, to recommend that Congress grant him authority to seek redress through reprisals. The House of Representatives declared by resolution that preparations should be made to meet the emergency and that the execution of the treaty should be insisted upon. But the Senate was less wrought up; and when Clay, from the committee on foreign relations, submitted a report opposing the grant that was asked, on the ground that reprisals would inevitably lead

[1] There was also considerable sentiment in Congress against war with France and a resolution was introduced providing that "under existing circumstances, it is not expedient for the United States to resort to war against the French Republic." The resolution, however, failed to pass. See *Annals of Congress*, 5th Cong., cols. 1319-20.

to war, a resolution was adopted to the effect that it was inexpedient at that time to pass any legislative measures regarding the relations between the two countries. This attitude of the Senate was probably largely instrumental in preventing the outbreak of hostilities.[1]

The President's sense of responsibility is doubtless greater, and it is usually he, rather than Congress or either branch thereof, that adopts the more conciliatory policy in time of difficulty with a foreign nation. To this rule there have, of course, been exceptions. The case of Jackson and the French treaty mentioned above is one of them; another is the Venezuela controversy with Great Britain during President Cleveland's administration, when the extreme position taken by the President and Mr. Olney, his secretary of state, might easily have led to war, had the British government adopted an equally firm attitude.[2] It must, of course, be remembered that, even though the President is extremely desirous of maintaining peace, and although he adopts every measure to that end consistent with our national honor and dignity, he will not always be able to prevent war, since war may be thrust upon us by a foreign nation against our will. Again, he may be unable to stem the tide of warlike excitement in Congress and among the people, fomented by the acts of the foreign nation, as in the cases of the war of 1812 and the Spanish-American war.

ARBITRATION

The policy of attempting to reach a settlement of international disagreements by arbitration when diplomacy fails is one to which the Government of the United States has almost uniformly adhered. In 1874 a resolution favoring general arbitration was passed by the House of Representatives, and in 1890 a concurrent resolution was passed by

[1] Moore, *Digest of Internat. Law*, VII, 123-7.

[2] It is true that in this case Congress, which had been generally hostile to the President, supported him.

both the House and the Senate requesting the President to invite negotiations with other governments looking toward the settlement of disputes by international arbitration.[1] A farther instance of Congressional sanction of this procedure is a paragraph of the naval appropriation act of 1916 in which Congress declared it to be "the policy of the United States to adjust and settle its international disputes through mediation or arbitration, to the end that war may be honorably avoided," and "authorized and requested" the President to call an international conference to consider arbitration and disarmament.[2]

On the whole, however, the President, as the officer charged with direct responsibility for our foreign intercourse, has been more interested in arbitration than has Congress. Although, as noted above, President Cleveland adopted a firm, and rather extreme, attitude in the Venezuelan controversy with Great Britain, he was at the very moment insisting upon arbitration of the boundary dispute; and by his insistence he succeeded in having the matter settled in that way. Already, in 1893, he had laid before Congress a resolution favoring international arbitration, and had expressed his "sincere gratification that the sentiment of two great and kindred nations is thus authoritatively manifested in favor of the rational and peaceable settlement of international quarrels by honorable resort to arbitration."[3] In his inaugural address President McKinley declared that arbitration "is the true method of settlement of international as well as local or individual differences."[4] In this connection, however, it should be noted that, to the proposal of Spain that all differences

[1] Cf. Richardson, *Mess. and Pap. of the Presidents*, IX, 442.
[2] 39 U. S., Stat. at L., 618.
[3] Richardson, *op. cit.*, IX, 442.
[4] This opinion was expressed by the President in connection with his request for the Senate's approval of the British arbitration treaty of 1897. Approval was not given.

arising from the destruction of the battleship *Maine* should be submitted to arbitration, McKinley made no reply.[1]

The treaty-making power has attempted to control the war power both positively and negatively. By negative control, in this connection, is meant the attempt by the treaty power to maintain peace by preventing the war-declaring power from being exercised. Numerous treaties have been entered into by the United States, beginning with the Jay Treaty in 1794, providing for the arbitration of particular disputes, which, if otherwise unsettled, might have led to war. We have also entered into a number of general arbitration treaties. Thus the United States was a party to the Hague conventions of 1899 and 1907 providing for the peaceful settlement of international disputes by mediation, by international commissions of inquiry, and through the establishment of a so-called permanent court of arbitration at the Hague. In 1911 two agreements were negotiated with Great Britain and France providing for general arbitration; although on account of Senate amendments which the President was unwilling to accept they were abandoned. The action of the Senate in this case would seem to indicate that, although that body was not opposed to the general policy of international arbitration, it was less interested in the promotion of that policy than in the preservation of its constitutional functions, as it conceived them, in the exercise of the treaty-making power.[2]

On several occasions the United States has attempted to place an indirect or partial limitation, in the international sense, upon the war-declaring power of Congress, by becoming a party to treaties providing for the submission, by special agreement, of international differences, with certain exceptions, to the permanent court of arbitration at The Hague. The differences specified are those of a legal nature or relating to the interpretation of treaties existing

[1] Richardson, *Mess. and Pap. of the Presidents*, X, 148.

[2] Cf. also the reservation of the Senate to the Hague convention of 1907 for the settlement of international disputes. Malloy, *Treaties*, etc., II, 2247-8.

between the contracting parties.[1] In a more direct way, however, we have attempted to limit, in an international sense, the exercise by Congress of the war-declaring power, by entering into the so-called Bryan peace treaties, under which the United States agreed with a number of powers not to go to war with another contracting party pending investigation of the dispute by an international commission.[2] These treaties may be considered as forming a precedent for Articles XII and XV of the Covenant of the League of Nations, under which the contracting parties agree (1) not to resort to war until three months after an arbitrators' award has been made or the report of the Council of the League has been submitted, and (2) not to go to war at all with any party which complies with the recommendations of the Council's report. Such treaty provisions, however, merely place a moral or political obligation upon Congress in the international sense, and cannot affect the constitutional power of that body to declare war at its discretion.[3]

NEUTRALITY

The President may endeavor to avoid war, not only through the negotiation of treaties, but also through his diplomatic and executive powers irrespective of any treaty. When he does this with a view to avoiding entrance by the United States into a war already in progress between other nations, his policy is known as that of neutrality. In the case of some important wars, *e.g.*, the Franco-Prussian war of 1870 and the Russo-Japanese war of 1904, the United States declared, and succeeded in maintaining, its neutrality. Once the dogs of war among foreign nations are loosed, however, the likelihood that the United States will

[1] See, *e.g.*, 35 U. S. Stat. at L., 1994.
[2] See, *e.g.*, 38 U. S. Stat. at L., 1853.
[3] Cf. Mathews, "The League of Nations and the Constitution," *Mich. Law Review*, XVIII, 386 (March, 1920).

be drawn into the struggle is usually greater than in the case of an international dispute which has not yet reached the stage of armed combat. At two stages in our national history the problem of maintaining our neutrality in the face of warring nations of Europe became extremely serious. The first was the period of the Revolutionary and Napoleonic wars of 1793-1815; the second was that of the World War of 1914-1919. In both cases we at first attempted to maintain complete neutrality, which we succeeded in doing for a time; but in both cases, also, we suffered infringements of our neutral rights from both parties or groups of parties to the struggle, and in both cases we were ultimately drawn into the conflict. In both instances it was the President who decided upon our policy of neutrality and kept us to it as long as was feasible. When he ceased to be able to maintain the policy, his inability arose not so much from pressure on the part of Congress as from intolerable acts of aggression and infringement of our neutral rights on the part of some European power or group of powers.

Our entrance into the European war was advocated by some persons at the time of the German invasion of Belgium in 1914, and the same step was urged by some at the time of the sinking of the *Lusitania* by a German submarine in the following year. Both of these incidents—certainly the latter—might have been considered a sufficient *casus belli* by even a slightly bellicose President. In both instances, however, as well as on the occasion of the *Sussex* outrage, President Wilson avoided war, and not until it became manifest to everybody that Germany had no intention of regarding our neutral rights did he finally decide to recognize the state of war thus thrust upon us.

Opposition arose in Congress in 1916 to the policy of the administration in declining to warn American citizens against traveling on the high seas in defensively armed merchantmen. Many members of that body believed that

this policy would inevitably lead to war. The McLemore resolution, which requested the President to give such warning, was tabled by a vote of almost two to one. It was, however, a determined attempt on the part of Congress to interfere with the complete control which the President exercised over the diplomatic issues involved in the relations between the United States and the warring nations of Europe. The President maintained that these were matters for his sole determination; and the defeat of the resolution seems to have been, to some extent at least, a Congressional recognition of the correctness of his position.

In the campaign of 1916 the country was urged to reëlect President Wilson because "he kept us out of war"; and not long afterwards he was being criticized on the score that, after being reëlected partly on the strength of that slogan, he had "got us into war." Without passing upon the merits of his course at any stage, the incident may merely be cited as indicating that, in popular estimation, the executive is the department of the Government which determines the question of peace or war.

It is customary for the President, at the outbreak of a war to which the United States is not a party, to issue a proclamation of neutrality between the belligerents. This was done for the first time by President Washington in 1793, upon the outbreak of war between France and Great Britain.[1] The proclamation issued on this occasion is a landmark in the history both of international law and of the governmental practice and policy of the United States toward European powers. It was put forth by the President after consultation with his cabinet, but without any express authorization by Congress; and inasmuch as the Constitution contains no provision expressly granting the power either to the President or to Congress, difference of

[1] *Am. State Papers, For. Rel.*, I, 140. For *facsimile* reproduction of this proclamation, see Moore, *Principles of American Diplomacy*, 41.

opinion naturally arose as to whether the President really has the power to issue a proclamation of the sort.

Debate on this question was carried on notably by Hamilton, who assumed the pen-name of "Pacificus," and by Madison, who wrote under the name of "Helvidius."[1] Madison argued, that the right to judge whether, under the existing treaty of alliance with France, the United States was obliged to declare war was included within the war-declaring power, and therefore belonged to Congress. Moreover, he endeavored to impale "Pacificus" on the logical horns of the dilemma that Congress is free to exercise, at its discretion, its war-declaring power and is at the same time bound by the Presidential proclamation of neutrality not to declare war.

The problem involved is essentially the same as that previously adverted to in considering efforts of the treaty power to control the power of Congress to declare war and to appropriate money. The constitutional discretion of Congress in the exercise of the last-mentioned powers must remain unfettered in spite of any treaty; otherwise the Constitution could be amended through the exercise of the treaty power. Likewise, the constitutional power of Congress to declare war remains legally unfettered by the previous action of the President in issuing a proclamation of neutrality, although that officer's action in this respect will naturally be taken into consideration by Congress as a factor in its decision to declare war or not to do so. Although, in practice, as is indicated above, Congress has never declared war except in pursuance of the recommendation of the President, it has the legal power to do so without such recommendation, and its failure to do so, provided it is in session during the progress of a war between foreign nations, may be taken as a sufficient indication of

[1] The substance of the constitutional arguments of these two writers is reprinted in Corwin, *The President's Control of Foreign Relations*, 8-27.

its intention that the country shall remain neutral.[1] The action of the President, therefore, in issuing a proclamation of neutrality under such circumstances is merely an official recognition and notification, to other nations as well as to our own citizens, by that department of our Government which is charged with the conduct of foreign intercourse, that we espouse the cause of neither side in the conflict, but propose to remain at peace; and the President's act may be considered as merely reinforcing and expressing the implied attitude of Congress, as evidenced by its failure to declare war. Nothing is more obvious than that it is the duty of the President, in conducting our international relations, to inform foreign governments what our policy is in matters of peace and war. A neutrality proclamation is one of several means of doing so.

At the time of the receipt of news in this country in April, 1793, that war had broken out between France and Great Britain, Congress had adjourned, and it had not yet reconvened at the time when Washington issued his proclamation. Consequently, it had no opportunity to give evidence of its attitude until the beginning of the next session, several months after the proclamation was issued. By passing an act or resolution declaring war, and by repassing it over the President's veto if necessary, it might then have nullified or reversed the policy that had been proclaimed. But it failed to do this. Likewise, the President, in view of changed conditions, might have abandoned his former attitude by recommending to Congress that it declare war, as President Wilson did in 1917 after issuing his proclamation of neutrality in 1914. This, also, was not done. After Congress has declared war, and while hostilities are in progress, the President cannot, by issuing a proclamation of neutrality, restore peace. It is then his

[1] On this point compare the debate on the proposed Congressional resolution of 1798 that "under existing circumstances, it is not expedient for the United States to resort to war against the French Republic." Annals of Congress, 5th Cong., cols. 1319-1320. For discussion of this case, see below, p. 301.

constitutional duty to enforce the laws passed by Congress for the prosecution of the war, including the declaration of the intention of our Government to pursue the contest to a successful termination.

In the discussion referred to above Hamilton maintained that "the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed" in the Constitution. Hence the President had the right to issue the proclamation, since the general powers relating to peace and war are vested in him, subject only to the limitation that the power of changing the condition of the country from one of peace to one of war is expressly vested by the Constitution in Congress. This view has been sanctioned by the practice of subsequent Presidents, is supported by the analogous power of the President to remove from office, and has received the implied approval of the Supreme Court in construing the powers of the judicial department of the Government.[1]

Although the President had the power to issue the proclamation of neutrality in 1793, there were not adequate laws for the strict enforcement of the policy upon our own citizens. Consequently, on Washington's recommendation, Congress, which is empowered by the Constitution to define and punish offenses against international law, passed penal statutes in 1794, and again in 1797, 1818, and at later dates, steadily enlarging the code and extending the jurisdiction of the courts in enforcing the neutrality laws.[2] Numerous cases have come up in the courts involving the interpretation and enforcement of these measures. It was provided, furthermore, that when the violation of our neutrality laws should be attempted on such a scale that the courts would probably not be able to enforce them, the President might

[1] Kansas *v.* Colorado, 206 U. S., 46, where it is pointed out that the Constitution does not make a general grant of legislative power to Congress, while, on the other hand, the entire judicial power of the nation, subject only to express limitations, is vested in the courts. Quoted in Corwin, *op. cit.*, 31.

[2] For the text of these acts, see C. G. Fenwick, *Neutrality Laws of the United States* (Washington, 1913), appendix.

employ the land and naval forces of the United States for the purpose.[1] Administrative action in the enforcement of the neutrality laws may be invoked also through the power of the United States district attorneys, under the direction of the President and the Attorney-General, to secure evidence and commence legal proceedings against violators, and through the power of the collectors of the customs, acting under the instructions of the Secretary of the Treasury, to detain vessels about to depart from our shores in violation of our neutrality.[2]

In view of unsettled conditions in Mexico in 1912 it seemed expedient to the President to concentrate a number of troops along the border, so as to prevent evasion of our neutrality laws; and in order to assist in achieving this purpose, Congress passed, in that year, a joint resolution empowering the President to prohibit the shipment of arms or munitions of war to any American country where conditions of domestic violence exist.[3] In pursuance of this important extension of his power, the President has on several occasions issued proclamations prohibiting the export of arms and munitions to Mexico. In 1915 Congress passed a joint resolution "to empower the President to better enforce and maintain the neutrality of the United States," authorizing him to direct the collectors of customs to detain vessels about to sail from our ports in violation of our neutral obligations, and to employ the land or naval forces to carry out the purpose of the resolution.[4]

It remains to point out the connection between the President's power of recognition and his power of issuing neutrality proclamations. It is axiomatic that a state cannot be neutral except as between two other contending states or groups of states. It follows that, when the President

[1] Sect. 9 of the act of 1818. Cf. Gelston *v.* Hoyt, 3 Wheat., 246, cited by Fenwick, *op. cit.*, p. 149. See also 21 Op. of Atty.-Gen., 267, 273, quoted in Moore, *Digest of Internat. Law*, VII, 1029.

[2] Sect. 11 of the act of 1818, Fenwick, *op. cit.*, 179.

[3] Text of resolution in Fenwick, *op. cit.*, 158.

[4] 38 Stat. at L., pt. 1, p. 1226.

proclaims neutrality between two contending parties, he thereby indirectly recognizes them as having for the time being the status of belligerency, if not of complete independence. When he proclaims neutrality between a generally recognized state and its revolting colony or dependency or a body of insurrectionists within its territory, his action is equivalent to a recognition by him of the latter as, for the time being, a *de facto* government. Thus President McKinley declared, in a message to Congress on Cuban affairs: "In the code of nations there is no such thing as a naked recognition of belligerency, unaccompanied by the assumption of international neutrality. . . . The act of recognition usually takes the form of a solemn proclamation of neutrality, which recites the *de facto* condition of belligerency as its motive."[1] Furthermore, a proclamation issued by the President declaring the existence of an insurrection within a friendly country and warning American citizens that participation in such disturbances constitutes a violation of our neutrality laws has been held by the Supreme Court to be tantamount to a recognition of a condition of insurgency, even though no recognition of belligerency has taken place.[2] Such a proclamation was issued by President Cleveland in 1895 with regard to the Cuban insurrection.

The concept of neutrality has doubtless lost something of its importance since 1914. The World War demonstrated the futility of the attempt to maintain neutrality on the part of a proud and commercially important nation in the face of desperate warfare conducted on a world-

[1] Richardson, *Mess. and Pap. of the Presidents*, X, 133.

[2] *The Three Friends*, 166 U. S., 1. On the difficulties we encountered in connection with the maintenance of our neutrality during the Cuban insurrection, see the responses of the Secretary of the Treasury to House and Senate resolutions requesting information regarding filibustering expeditions to Cuba and measures adopted to thwart violations of our neutrality off the coast of Florida (Sen. doc. 35, and House doc. 326, both of the 55th Cong., 2d sess.). Cf. "The Law of Hostile Military Expeditions as Applied by the U. S.," *Am. Jour. Internat. Law*, VIII, 1, 224.

wide scale.[1] In view of this fact, the Covenant of the League of Nations (Article XVI) provides for the automatic creation of a state of war between a peace-breaking member and all of the remaining members. Thus is frankly recognized the inescapable truth that the members of the League cannot and should not remain neutral in the face of an invasion of the peace of the world, even though they may not be immediately or directly attacked.[2] Despite the decreasing importance of the concept of neutrality, however, the right and the capacity of the President, through the exercise of his diplomatic and executive functions, to maintain the peace and to avert resort to arms must be, in the future as in the past, of tremendous importance for the welfare of the nation.

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[1] R. F. Roxburgh, "Changes in the Conception of Neutrality," *Journal of Comparative Legislation*, April, 1919, p. 23.

[2] Mathews, "League of Nations and the Constitution," *Michigan Law Review*, XVIII, 384 (March, 1920).

CHAPTER XV

FORCIBLE MEASURES SHORT OF WAR

THE use of the armed forces of the United States in such a manner as to derogate from the effective sovereignty of a foreign country has frequently taken place without a formal declaration of war by Congress. Such use of armed forces may or may not amount to intervention, in the sense in which that term is employed in international law. Intervention may be either political or non-political. If, as is usually the case when the United States is involved, it is non-political, it partakes of the character of non-belligerent interposition,[1] and as such may be undertaken with or without the consent of the government of the foreign country concerned. In the nature of the operations involved, although usually not in their extent, it may differ but little from war in the material sense; and it may develop into war, through the action of either party in recognizing it as such. Until so recognized, it differs from war in that the juridical results of the status of war are not produced as between the parties involved, and in that third powers are not charged with the duties of neutrals under international law. It does not necessarily result in war and may, indeed, be adopted purposely as a measure to prevent war. The power of the President to use the armed forces of the country not only extends, as we shall see, to repelling actual invasion of our territory and recognizing the existence of a state of war through foreign aggression, but may be exerted in and against foreign countries or on the high seas in the protection of

[1] Cf. Borchard, *Diplomatic Protection of Citizens Abroad*, 448.

the rights and interests of the Government and citizens of the United States. In this chapter we are concerned with the use of armed force by our Government in those cases only in which the actual resort to force was neither preceded nor followed by a formal declaration of war by Congress.

The power of the President as commander-in-chief to direct, in time of peace, the non-hostile movements of our military forces on our own territory and of our naval forces on the high seas and into foreign ports and territorial waters merges almost imperceptibly into his power to direct the movements of those forces in such a manner as to constitute an actual or potential exercise of physical pressure against a foreign country. In its preliminary stage, a non-hostile movement may go no farther than a mere display of force; actual use of force may or may not result. Thus in the early part of the nineteenth century the United States maintained a small squadron in the Mediterranean Sea as an alternative to paying tribute to the Barbary states for the security of our commerce in those waters.[1] Again, in 1911 President Taft directed the mobilization of twenty thousand American troops on the Mexican border, in view of the disturbed conditions in that country.[2] When, in 1895, an American warship was sent to Turkish waters, Secretary Olney notified the Turkish minister that "the visit of the *Marblehead* to Turkish waters at this junction is in pursuance of a long-established usage of this Government to send its vessels, in its discretion, to the ports of any country which may for the time being suffer perturbation of public order and where its countrymen are known to possess interests. This course is very general with all other governments, and the circumstance that a transient occasion for such visits may exist

[1] See Moore, *Digest*, VII, 107, and other instances there cited.
[2] *For. Rels. of U. S.*, 1911, p. XII.

does not detract from their essentially friendly character."[1]

In going beyond a mere display of force to the actual exercise thereof the President usually conforms his action to the rules of international law, which recognize the right of a nation, under certain circumstances, to resort to non-amicable measures of redress short of war, such as reprisals, pacific blockade, and other forms of non-belligerent interposition. In the case of the *Paquette Habana*,[2] the Supreme Court declared that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." This is the rule which must be regarded as applying when the President, as commander-in-chief, directs the movements of our forces in non-amicable measures short of war. Action of this kind has usually been taken in Latin-America rather than in Europe or Asia, and in recent years it has been so frequent as to have become a main factor in developing a new and more sweeping interpretation of the Monroe Doctrine. The explanation lies largely, of course, in our proximity to the Latin-American world, in the lack of order and stable government there, in our acquisition of islands in the Caribbean, and in our construction of and interest in the Panama Canal.

It has been pointed out in a previous chapter that, by virtue of his powers as commander-in-chief of the army and navy, the President may enter into executive agreements during time of peace. He may also, of course, conduct diplomatic negotiations which do not develop into executive

[1] *For. Rels. of U. S.*, 1895, II, 1324, quoted in Borchard, *Diplomatic Protection of Citizens Abroad*, 448. Cf. *ibid.*, II, 1257.
[2] 175 U. S., 677, 700.

agreements and do not relate specifically to military or naval matters. The combination in the person of the President of the offices of diplomatic head of the nation and commander-in-chief of the armed forces enables these powers to supplement each other in the attainment of the objects of our foreign policy. With a view, for example, to emphasizing his diplomatic representations, the President may, as already indicated, cause naval or military demonstrations to be made in the appropriate localities, as in the case of Panama in 1903 and in that of Santo Domingo in 1905. In the latter instance the object was to maintain a diplomatic situation pending action upon a treaty by the Senate.[1]

In a memorandum of the solicitor of the Department of State will be found a list of the cases, down to 1912, in which the forces of the United States have landed on foreign soil for the purpose of protecting American interests in accordance with general international right, there being in all of these instances no treaty right involved, no declaration of war by Congress, and no existing diplomatic difficulty between the two countries.[2] About fifty instances are enumerated, from the landing on Amelia Island in 1811 to that in Honduras in 1911. The principal purposes for which our forces were thrown upon foreign soil in this period were the simple protection of American citizens in disturbed areas; punishment of natives for the murder of, or injuries committed against, American citizens; suppression of local riots; preservation of order; and securing an indemnity, or seizing custom houses, as satisfaction for injuries and insults to the American flag and uniform.[3]

In some instances the action was taken by our military or naval commanders without specific authorization from

[1] See Foster, *Practice of Diplomacy*, 327, and passages in Cong. Record there cited. Cf. Willoughby, *Constitutional Law*, I, 472.

[2] J. Reuben Clark, *Right to Protect Citizens in Foreign Countries by Landing Forces* (Washington, 1912).

[3] *Ibid.*, pp. 31 *et seq.*, and appendix.

the Government, and therefore on their own responsibility. Thus, as stated by the Secretary of the Navy in 1904, "the crises at Panama have developed so quickly that the [Navy] Department, prior to 1885, had small opportunity to issue special instructions, but the senior naval officer present took such measures as seemed necessary."[1] Such action of military or naval commanders has sometimes been disavowed.[2] In most cases, however, it has been supported, thereby becoming the official action of the Government itself.

The President may use the armed forces of the United States in or against a foreign country, by way of nonbelligerent interposition, under three different conditions: (1) when acting solely under his constitutional authority as commander-in-chief and under general international right, without specific authority of Congress or either branch thereof; (2) when acting with the consent of both branches of Congress as embodied in an act or joint resolution, which, however, is not, at least in form, a declaration of war; and (3) when acting with the concurrence of the Senate, as well as of the government of the country against which, or in whose behalf, the forcible operation takes place, as embodied in general terms in a previous treaty.

SIMPLE PRESIDENTIAL ACTION

One of the most important cases of the first type arose in China in 1900, when it became necessary to defend the

[1] "Use by the United States of a Military Force in the Internal Affairs of Colombia," Senate doc. 143, 58th Cong., 2d sess., p. 77.

[2] Thus when Commodore Porter landed two hundred men in Porto Rico in 1824 to avenge insults which the local authorities had visited upon the officers of an American vessel, our Government disavowed the action on the ground that he had overstepped the limits of his powers. *Ibid.*, 49-50. In the case of the occupancy of Amelia Island by General George Matthews in 1812, which he deemed to be in accordance with his general instructions, the Government disavowed the methods which he pursued, but nevertheless retained possession of the Island. *American State Papers, Foreign Relations,* III, 571-2; Henry Adams, *History of the United States,* VI, 237-43; Richardson, *Mess. and Pap. of the Presidents,* I, 506-8.

Western legations against the attacks of the Boxers. Congress was not in session when the emergency arose, and in joining the other powers in sending an expedition to Peking the President acted on his own authority. This has been called "one of the most extreme acts of executive authority in the history of the United States."[1] But it was justified by the urgency of the situation and was supported by public opinion. As President McKinley said: "Our declared aims involved no war against the Chinese nation. We adhered to the legitimate office of rescuing the imperiled legation, obtaining redress for wrongs already suffered, securing wherever possible the safety of American life and property in China, and preventing a spread of the disorders or their recurrence."[2]

Another illustration is the celebrated case of Martin Koszta, whose detention by Austrian authorities in 1853 led the captain of an American warship to clear his decks for action. The captain's act was fully supported by the executive department of our Government, and Congress indicated its approval by voting a gold medal; although, since Koszta was not a fully naturalized citizen, our right under international law to protect him by force was rather tenuous.[3]

Still another case is the landing of American marines in Haiti in 1915 to protect American interests which were jeopardized by a revolution. Although authorized by no act of Congress or treaty, American officials administered the customs at all Haitian ports and later supervised the national election. A treaty was entered into in the following year, however, which regulated such procedure on our part for the future.[4]

An interesting case of purely executive action also oc-

[1] Foster, *American Diplomacy in the Orient*, 421.

[2] Annual Message, Dec. 3, 1900, *For. Rels.*, 1900, pp. XIII ff.; see also *ibid.*, pp. 102 ff.

[3] W. F. Johnson, *America's Foreign Relations*, I, 531-3; cf. a dictum by the Supreme Court *in re* Neagle, 135 U. S., 64.

[4] 39 Stat. at L., p. 1659; cf. also 39 *ibid.*, p. 223.

curred in 1854 when Captain Hollins of the U. S. S. *Cyane,* after public proclamation, bombarded Greytown, Nicaragua, to avenge insults visited upon the American minister.[1] His action was supported by President Pierce,[2] and in a case involving the matter the lower federal court said: "As respects the interposition of the Executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President."[3]

In view of insults and indignities committed by the forces of General Huerta against the American flag and the person of American sailors landed for peaceful purposes from our vessels in the harbors of Tampico and Vera Cruz, President Wilson, on April 20, 1914, appeared before a joint session of Congress, declaring that he had come to ask the approval and support of that body in the course which he had decided to pursue. "No doubt," he said, "I could do what is necessary in the circumstances to enforce respect for our Government without recourse to the Congress and yet not exceed my constitutional powers as President, but I do not wish to act in a matter possibly of so grave consequence except in close conference and coöperation with both the Senate and House. I therefore come to ask your approval that I should use the armed forces of the United States in such ways and to such an extent as may be necessary to obtain from General Huerta and his adherents the fullest recognition of the rights and dignity of the United States."[4]

Two days later Congress passed a joint resolution which declared that "the President is justified in the employment of the armed forces of the United States to enforce his demand for unequivocal amends for certain affronts and

[1] J. Reuben Clark, *Memorandum of Solicitor,* 53.

[2] Richardson, *Mess. and Pap. of the Presidents,* V, 282; see also Moore, *Digest of Internat. Law,* VII, 112-6.

[3] 4 Blatchford, 451, quoted in Corwin, *President's Control of Foreign Relations,* 145. For other instances, see Moore, *Digest of Internat. Law,* VII, sect. 1093.

[4] Congressional Record, April 20, 1914, vol. 51, p. 6909.

indignities committed against the United States."[1] The President had asked for approval, not for authority; hence the use of the word "justified" rather than of "authorized." In order to make clear that this did not constitute a declaration of war or an authorization to wage war, the resolution added that "the United States disclaims any hostility to the Mexican people or any purpose to make war upon Mexico."[2]

While deeming it expedient to secure the support of Congress, President Wilson did not consider any action by that body to be legally necessary in order that he might adopt forcible measures in Mexico. This is shown by his action on April 21, the day before the joint resolution was passed, in landing forces and seizing the custom house and other buildings at Vera Cruz, with the loss of several men killed and injured. The failure to wait for the passage of the resolution by Congress was doubtless due to the approach of a German ship carrying arms and ammunition. In the absence of a state of war it was considered of doubtful legality to establish a blockade effective for third states and so detain this ship; but by seizing the custom house the munitions could be prevented from reaching General Huerta.

The occupation of Vera Cruz continued about seven months. On April 23 the Mexican foreign minister handed our *chargé d'affaires* at Mexico City his passports with a note which declared that "according to international law, the acts of the armed forces of the United States . . . must be considered as an initiation of war against Mexico."[3] The situation thus brought on by the President under the provocation of Huerta, while technically a reprisal, certainly constituted material, if not legal, war, and it might

[1] 38 Stat. at L., p. 770.
[2] *Ibid.*
[3] *American Year Book*, 1914, p. 35.

easily have developed into legal war, in spite of the fact that Congress had neither declared war nor authorized the use of force by the President.

PRESIDENTIAL ACTION WITH CONGRESSIONAL CONCURRENCE

The second class of cases of the President's use of force short of war consists of those in which he acts with the consent or concurrence of Congress. Sometimes the action of Congress takes the form of expressly authorizing the President to use the public armed forces of the United States to defend American rights and to repel aggression. The appropriation by Congress of funds to support and maintain an army and navy is sufficient action on the part of that body to enable the President, as commander-in-chief, to use force for those purposes. No special authorization is legally necessary, although it may be given with a view to showing the practical coöperation of the two houses in presenting a united front against foreign aggression.

The occasions on which Congress has authorized or concurred in the use of force by the President are numerous. Acts of 1807 and 1819 authorized and requested him to employ the armed vessels of the United States to capture slave-smuggling ships and to protect our merchant ships and crews from piratical aggressions:[1] A secret act of 1811 authorized him "to take possession of and occupy . . . the territory lying east of the River Perdido and south of the state of Georgia" and provided that for this purpose, and in order to maintain therein the authority of the United States, "he may employ any part of the army and navy of the United States which he may deem necessary."[2]

The Constitution authorizes Congress to provide for calling forth the militia to execute the laws and repel invasions, and in pursuance of this power general statutes

[1] 2 Stat. at L., 428; 3 Stat. at L., 511.
[2] 3 Stat. at L., 471.

were passed in 1795 and 1807 declaring it to be lawful for the President to call forth the militia and to employ the land and naval forces of the United States to suppress insurrection or to repel invasion from any foreign nation or Indian tribe.[1] Congress, of course, is not always in session, and when it becomes necessary to defend the country against sudden and unexpected aggression the President is bound to act, even before Congress has assembled. In such a case, moreover, the President acts under his constitutional authority to see that the laws are faithfully executed, since an invasion necessarily interferes with the complete enforcement of federal law on our territory. The Supreme Court has held that, in the matter of repelling invasion, the President is the sole judge of whether the exigency warrants calling out the forces.[2]

During the controversy with Great Britain over the Northeast boundary line Congress passed, in 1839, an act authorizing the President "to resist any attempt on the part of Great Britain to enforce by arms her claim to exclusive jurisdiction over that part of the state of Maine" which was in dispute; and for that purpose to employ the naval and military forces of the United States and such portions of the militia as he might deem it advisable to call into service. The act further authorized him to accept the service of volunteers in case of actual or imminent invasion of the territory of the United States at a time when Congress was not in session and could not be convened in time to act upon the subject.[3]

A case of reprisal authorized by Congress occurred in 1858, when, by joint resolution, it was provided that "for the purpose of adjusting the differences between the United States and the republic of Paraguay in connection with the attack upon the United States steamer *Water Witch* . . . the President is hereby authorized to adopt such measures

[1] 1 Stat. at L., 424; 2 *ibid.*, 443.
[2] Martin *v.* Mott, 12 Wheat., 19.
[3] Act of Mar. 3, 1839, 5 Stat. at L., 355-6.

and use such force as in his judgment may be necessary and advisable in the event of a refusal of just satisfaction by the Government of Paraguay." [1] The resolution was opposed in the Senate on the ground that it authorized the President "to commence war in his discretion," but this contention was rebutted by the measure's supporters.[2] In this connection should be mentioned also the act of 1856 which authorized the President, at his discretion, to employ the land and naval forces of the United States to protect the rights of American discoverers of guano islands.[3]

There is thus abundant precedent for action by Congress authorizing the President to use force against foreign powers without going so far as to declare war. It does not follow, however, that because Congress "authorizes" the President to use force, he would not have such authority independently. It is merely deemed good policy that the President should have the moral support of the legislative branch, irrespective of the question of legal power. It is true that President Buchanan took the view that Congressional authorization is necessary to enable the President to conduct warlike operations, except to repel an actual attack of an enemy. In accordance with this belief, he requested Congress to authorize him to use force for the protection of American lives and property against unlawful attack while traversing the ocean-to-ocean transit routes in Central America.[4] Most other Presidents, however,

[1] Joint Resolution of June 2, 1858, 11 Stat. at L., 370. Cf. also the joint resolution of June 19, 1890, which became law without the President's signature, authorizing reprisals against Venezuela. 26 Stat. at L., 674.

[2] Cong. Globe, 35th Cong., 1st sess., pt. II, pp. 1704, 1727, 1783, 1929. *Memorandum of the Solicitor*, 34. For an account of the circumstances of the attack on the *Water Witch*, see Moore, *Digest of Internat. Law*, VII, 109-12.

[3] Act of Aug. 18, 1856, 11 Stat. at L., 120.

[4] Richardson, *Mess. and Pap. of the Presidents*, V, 570. Buchanan, however, did not always consistently hold this view. See, for example, his apparently approving comments upon the destruction of the Barrier forts in China by our squadron to avenge an alleged insult to our flag, and upon the dispatch of a naval force to Cuban waters to protect American vessels from search and detention by warships of any other nation. Both actions were taken without express Congressional authority. Richardson, *Mess. and Pap. of the Presidents*, V, 506-7. Mr. Cass, his secretary of state, said in 1857 that "our naval officers

have not shared Buchanan's view. Even Jefferson, although admitting that "Congress alone is constitutionally invested with the power of changing our condition from peace to war," sent a small squadron of frigates into the Mediterranean, without Congressional authorization, with orders to protect our commerce against threatened attack.[1] This attitude seems also to be taken by the Supreme Court, judging from the line of reasoning adopted in the Prize cases, and also by analogy from the doctrine laid down in the Neagle case to the effect that the President may exercise his constitutional powers without waiting, in all cases, for ancillary Congressional legislation.[2] Since such legislation is not a necessary accompaniment of Presidential action, it follows that Congress has no special power to direct the President in the use of the armed forces in operations not amounting to foreign war.[3]

PRESIDENTIAL ACTION UNDER TREATY AUTHORIZATION

We may now consider the power of the President to use force with the concurrence of the Senate and with the consent, as embodied in a previous treaty, of the government of the country against which, or in whose behalf, the forcible operation takes place. Under our treaty of 1846 with New Granada (Colombia) we guaranteed the "perfect neutrality" of the Isthmus of Panama and the rights of sovereignty and property which New Granada had over that territory,[4] and by the Clayton-Bulwer treaty of 1850 we entered into a similar covenant with Great Britain

have the right—it is their duty, indeed—to employ the forces under their command, not only in self-defense, but for the protection of the persons and property of our citizens when exposed to acts of lawless outrage, and this they have done both in China and elsewhere." He added, however, that "military expeditions into Chinese territory cannot be undertaken without the authority of the national legislature." Moore, *Digest of Internat. Law*, VII, 164.

[1] Moore, *Digest of Internat. Law*, VII, 162.

[2] 135 U. S., 1. Cf. Logan *v.* U. S., 144 U. S., 263, 294.

[3] Cf. *Memorandum of the Solicitor*, 36.

[4] Malloy, *Treaties*, etc., 312.

respecting the Isthmian canal.[1] Further, through our treaty of 1904 with Panama we undertook to guarantee and maintain the independence of that republic.[2] In this same agreement we reserved the right to employ armed forces, if it should become necessary, for the safety or protection of the canal, and to use at any time and in our discretion our police and land and naval forces, or to establish fortifications for these purposes.[3] "These treaty provisions do not go so far as to require a declaration of war on our part, but they almost necessarily imply intervention or warlike measures by us in case the independence or neutrality guaranteed is threatened or in imminent danger."[4] As a matter of fact, in pursuance of the above-mentioned provision of the treaty of 1846 with New Granada, the United States has on several occasions landed forces on the Isthmus of Panama. In September, 1902, such forces were landed solely on the initiative of the United States, although the Panama authorities were informed in advance. Usually, these landings were made at the request of the authorities of New Granada (or Colombia), and for the purpose of protecting United States property and maintaining order and the freedom of transit across the Isthmus under the provisions of the treaty.[5]

The peculiar relations existing between the United States and the states of Central America have, as previously indicated, led to numerous landings of American forces in those countries without a declaration of war. In this connection ex-President Taft says:

"What constitutes an act of war by the land or naval forces of the United States is sometimes a nice question of law and fact. It really seems to differ with the charac-

[1] Malloy, *Treaties*, etc., 664.
[2] *Ibid.*, 1349.
[3] *Ibid.*, 1356.
[4] Mathews, "The League of Nations and the Constitution," *Mich. Law. Rev.*, XVIII, 385 (March, 1920).
[5] "Use by the United States of a Military Force in the Internal Affairs of Colombia," etc., Senate Doc. 143, 58th Cong., 2d sess., pp. 2-3.

ter of the nation whose relations with the United States are affected. The unstable condition as to law and order of some of the Central American republics seems to create different rules of international law from those that obtain in governments that can be depended upon to maintain their own peace and order. It has been frequently necessary for the President to direct the landing of naval marines from the United States vessels in Central America to protect the American consulate and American citizens and their property. He has done this under his general power as commander-in-chief. It grows not out of any specific act of Congress, but out of that obligation, inferable from the Constitution, of the government to protect the rights of an American citizen against foreign aggression. . . . In practice the use of the naval marines for such a purpose has become so common that their landing is treated as a mere local police measure, whereas if troops of the regular army are used for such a purpose it seems to take on the color of an act of war."[1]

He adds that during his administration an insurrection in Nicaragua led to the landing of some of our marines and to "quite a campaign" for the protection of American citizens and their property.

The landing of American forces in Nicaragua in 1912 came by way of practical enforcement of that provision of the Washington Conventions of 1907 between the five Central American republics which declared that "every disposition or measure which may tend to alter the constitutional organization in any of them is to be deemed a menace to the peace of said republics."[2] The United States, it is true, was not formally a party to these conventions. But the agreements were concluded under the auspices of our Government, and an official statement of the policy of the United States in the Nicaragua case was made to the effect that the measures which we found it necessary to take in

[1] *Our Chief Magistrate and His Powers*, 95-6.
[2] Malloy, *Treaties*, etc., 2393.

that country in 1912 were in pursuance of the "moral mandate" which the United States had under the Washington Conventions.[1]

LATIN-AMERICAN PROTECTORATES

The policy of intervention pursued by the United States in continental Latin-America has for its main precedents the relation set up between the United States and Cuba as a result of the Spanish-American war. The terms of this relation were embodied both in an act of Congress and in a treaty. By the Platt Amendment of 1901, Congress stipulated that, as a condition of the withdrawal of American troops from Cuba, a government should be established in that island under a constitution providing, among other things, that the new government should itself consent that the United States should "exercise the right to intervene for the preservation of Cuban independence and the maintenance of a government adequate for the protection of life, property and individual liberty."[2] The substance of this provision was embodied not only in the Cuban constitution but also in a treaty between the United States and Cuba, ratified in 1904.[3] Two years later the disordered condition of affairs in the island compelled the United States to intervene in accordance with the agreement. A provisional military government displaced the Cuban government and held the field for more than two years. Early in 1909, however, American troops were again withdrawn, and the Cubans resumed control. No subsequent intervention has taken place, although in 1912, and again in 1917, one was threatened.[4]

Our relations with Cuba, which thus make of that island a virtual protectorate of the United States, have served

[1] *For. Rels. of U. S.*, 1912, pp. 1042-4.
[2] Act of March 2, 1901, 31 Stat. of L., 897.
[3] Malloy, *Treaties*, etc., 364.
[4] *For. Rels. of U. S.*, 1912, pp. 248 ff.

as a model and precedent, to some extent at least, for the development of similar relations with other Latin-American countries, especially Haiti, San Domingo, Panama, and Nicaragua. Thus in a clause manifestly modeled on the Platt Amendment a treaty of 1915 with Haiti provides that "should the necessity occur, the United States will lend an efficient aid for the preservation of Haitian independence and the maintenance of a government adequate for the protection of life, property, and individual liberty."[1] Opportunity to lend the "efficient aid" specified, by landing marines for police purposes, has not been wanting. The Haitian treaty provides also that the insular constabulary shall be organized and officered by Americans, to be appointed by the President of Haiti on the nomination of the President of the United States;[2] and by an act of 1916 Congress authorized the President, "in his discretion, to detail to assist the Republic of Haiti such officers and enlisted men of the United States Navy and Marine Corps as may be mutually agreed upon by him and the President of Haiti."[3] Since 1916 the military occupation of Santo Domingo has been maintained by American marines, as a mode of enforcing Art. III of the treaty of 1907 between the United States and that republic.[4]

SUMMARY AND CONCLUSION

Under the Constitution Congress is vested with the power of raising, supporting, and equipping the military and naval forces of the United States and of making appropriations for that purpose, subject to the condition that appropriations for the army shall not extend beyond a period

[1] 39 Stat. at L., pt. 2, p. 1659. On this treaty see *Am. Jour. of Internat. Law*, X, 859-65 (Oct., 1916).
[2] *Ibid.*, 1658.
[3] 39 Stat. at L., 223. Congress made similar provision in 1918 for the Dominican republic. 40 Stat. at L., 437.
[4] P. M. Brown, "The Armed Occupation of Santo Domingo," *Am. Jour. of Internat. Law*, XI, 394-9 (Apr., 1917).

of two years.[1] The power of directing the movements of the armed forces, however, is lodged in the President, by virtue of his status as commander-in-chief of the army and navy. Although the power to declare war is expressly vested only in Congress, that body is not always in session, and when it becomes necessary to defend the country against sudden aggression before Congress can be assembled, the President, in his capacity of commander-in-chief, may repel invasion through the use of the armed forces without special legislative authorization.[2]

That the President would find occasion to conduct war-like operations of a defensive character without express legislative authorization was expected by the framers of the Constitution, who accordingly substituted "declare" for "make" in the grant of the war power to Congress, "leaving to the Executive the power to repel sudden attacks."[3] Apropos of the Hague Convention concerning the opening of hostilities, the American delegation to the second Hague Conference asserted that "it has been the unbroken practice of the Government of the United States for more than a century to recognize in the President, as the commander-in-chief of the constitutional land and naval forces, full power to defend the territory of the United States from invasion, and to exercise at all times and in all places the right of national self-defense."[4] As the Supreme Court declared in the Prize Cases, "if a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He

[1] Art. I, sect. 8.

[2] The President might also take such steps, if he deemed it necessary to do so, before Congress has acted, even though that body is in session at the time the emergency arises. In this connection it may be noted that each of the several states of the Union, although having no power to declare war against a foreign nation, may defend itself by force if actually invaded or in such imminent danger as will not admit of delay. Constitution, Art. I, sect. 10, cl. 3.

[3] *Journal of the Convention* (Hunt ed.), II, 188; Cf. Curtis, *Constitutional History of the U. S.*, II, 332, and Whiting, *War Powers under the Constitution* (43rd ed.), p. 39.

[4] G. B. Davis, "Amelioration of the Rules of War on Land," *Am. Jour. Internat. Law,* II, 66 (Jan., 1908).

does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."[1] This statement is undoubtedly true as a corollary of the general principle of national self-preservation, as well as by implication from the President's constitutional powers. The question, however, has been raised whether the President may recognize a foreign war not attended by invasion of American territory and by his act produce the juridical results of a status of war, and the Prize Cases have been referred to as answering the query in the affirmative.[2] It should be remembered, however, that the Prize Cases were decided by a divided court (four justices, including Chief Justice Taney, dissenting), and that the statements in the majority opinion were *obiter* in so far as they applied to a foreign war. The better law, at least theoretically, would seem to be embraced in the assertion of Justice Nelson, speaking for the minority of the court, that the "President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights and thus change the country and all its citizens from a state of peace to a state of war." Moreover, as was pointed out in the majority opinion, "a civil war is never publicly proclaimed, *eo nomine*"; and if the President had performed acts requiring legislative authorization, this was to be regarded as having been given by the act of Congress of 1861 "approving, legalizing and making valid all the acts, proclamations and orders of the President as if they had been issued and done under the previous express authority and direction of Congress." The majority of the court did not admit that this act of Congress was necessary. As was pointed out in the dissenting opinion, however, the President, by virtue of his constitutional power to see that the laws are executed and of acts of

[1] 2 Black, 635. Cf. Talbot *v.* Janson, 3 Dall., 133.
[2] Corwin, *The President's Control of Foreign Relations*, 141-2.

Congress authorizing him under certain circumstances to call out the militia, could meet a situation arising during the recess of Congress due to foreign invasion of our territory,[1] or an insurrection of any considerable dimensions, since such disturbances necessarily interfere with the enforcement of Federal law.[2] At any rate, the Prize Cases show conclusively that the question of the existence of war and of the date of its beginning is a political one, to be determined by the political department of the government. The courts consider such determination as binding upon themselves.

The question of the relative powers of the President as commander-in-chief and of Congress over the military and naval forces of the United States was raised in the Senate in connection with the debate upon the Lodge reservation to Article X of the Covenant of the League of Nations. This reservation was to the effect that Congress, under the Constitution, "has the sole power to declare war or authorize the employment of the military or naval forces of the United States."[3] As was pointed out by Senator Borah, this statement, apparently intended as a mere declaration of fact, is not strictly correct.[4] It is, of course, true that Congress alone can make provision for raising and maintaining military and naval forces, and that it may make rules for the government and regulation of such forces. But it is not true that, after raising forces and providing for their support, Congress can restrict the discretion of the President, as commander-in-chief, in directing their movements and in otherwise disposing of them.

[1] Our ships on the high seas and our embassy and legation buildings abroad are technically parts of our territory.

[2] In Hamilton *v.* McClaughry (136 Fed., 445), however, it was held that the question as to the existence of a condition of war is within the exclusive jurisdiction of the political department of the Government, and that the Boxer uprising of 1900 in China constituted a "time of war" within the meaning of the fifty-eighth article of war, providing for the trial by military court-martial of certain offenses committed by soldiers in time of war.

[3] Cong. Record, March 19, 1920, p. 4899.

[4] See his speeches in Cong. Record, November 5, 1919, and November 10, 1919, pp. 8465, 8681 ff.

Theoretically, Congress might, indeed, impose an indirect limit on the President's powers by refusing to make further military or naval appropriations. In the present state of public opinion at home and of conditions abroad it would be politically impossible, however, for the legislative branch thus to leave the country defenseless.

As long as armed forces exist, the President, as commander-in-chief, may on occasion use them to conduct warlike operations without special legislative authorization. This is especially true of defensive operations, which are dependent not on the choice of our Government but on that of any aggressive foreign power.[1] Even in the absence of treaty provision or legislative authorization, the President on his own initiative may, as commander-in-chief, send military and naval forces to foreign countries to protect American lives, property, and even inchoate interests. Where there is neither treaty provision nor legislative authorization, and where no danger to American interests exists, he cannot land troops for hostile purposes or commit acts of a warlike nature without usurping his authority; but he may make naval demonstrations and dispatch warships on ostensibly peaceful missions, as in the case of the sending of the battleship *Maine* into Havana harbor. Where we have a treaty with a foreign country authorizing us to do so, the President, by virtue of his power to see that the laws (including treaties, which are a part of the supreme law of the land) are executed, may, as commander-in-chief, send military or naval forces to that country to maintain peace and order, irrespective of whether American inter-

[1] Cf. Whiting, *War Powers under the Constitution* (43rd ed.), 39. That Congress cannot, notwithstanding its military powers, control the action of the President as commander-in-chief was indicated by an attempt to do this in 1912 through its financial power. The attempt took the form of a proposed amendment to the Army Appropriation Bill providing that "no part of the money herein appropriated shall be used for the pay or supplies of any part of the army employed, stationed or on duty in any country or territory beyond the jurisdiction of the laws of the United States." The proviso was added, however, "that this prohibition shall not apply to cases of emergency within the discretion of the President arising at a time when the Congress is not in session." Cong. Record, August 14, 1912, vol. 48, p. 10921.

ests are directly involved. This is not war, nor necessarily a preliminary of war; rather, it is intended as a measure for the prevention of war, as was notably true in a number of instances in which the United States landed forces in Latin-American countries. Such action has often been considered necessary in order to avoid armed intervention by European powers in the affairs of such countries in violation of the Monroe Doctrine. As we have seen, the peculiar relations with and interests in Latin America which are construed to give us a right of intervention, have now in several instances, *e.g.*, Cuba, Panama, and Haiti, been regularized by treaty provision.

The President has sometimes undertaken to use force for the protection of territory in Latin-American countries pending its annexation to the United States under a treaty not yet approved by the Senate. The action of President Grant in sending naval forces to Santo Domingo in 1871 under such circumstances was denounced by Senator Sumner as involving an unlawful assumption by the President of the war-making power for the protection of what Sumner himself characterized as "inchoate" or "contingent" interests of the United States. The Senator's resolutions condemning the action of the President were, however, laid on the table by a vote of more than two to one.[1] Similar action of President Tyler with reference to Texas in 1844 was also strongly denounced in the Senate. In neither of these cases was the ratification of the pending treaty advised and consented to by the Senate, although in the case of Texas a joint resolution of annexation was eventually passed.

In view of subsequent developments, the attitude of the Senators who denounced the action of the President on these occasions seems somewhat overdrawn. As already indicated, President Roosevelt, in 1905, undertook to maintain in Santo Domingo, by the use of our naval forces, a

[1] Moore, *Digest of Internat. Law*, I, 278-9, and references to Cong. Globe there cited.

diplomatic situation pending action upon a treaty by the Senate, which, in fact, failed of ratification.[1] In 1903 he maintained a naval force in the neighborhood of Panama pending the outcome of a successful revolution therein against Colombia, and the result was ratified by the treaty of the following year with Panama in which the United States promised to guarantee and maintain the independence of that republic.[2] In still other instances the President has used force in Latin-American countries with which we had no treaty granting such authority, either ratified or pending, and in which American interests were not directly menaced. If such action may be taken with reference to countries with which we have not even a pending treaty, it would seem to follow that the President would not be disabled by the failure of a pending treaty to receive the Senate's approval; although this would be true only in the case of those Latin-American countries with which, as already pointed out, we have special and peculiar relations. The power of intervention and of police supervision which the Presidents have developed places upon them a heavy responsibility for the maintenance of peace and the adjustment of international complications.

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[1] This, however, was a treaty, not of annexation, but of financial supervision.

[2] Malloy, *Treaties*, etc., II, 1349. See C. L. Jones, *Caribbean Interests of the United States*, 202. This is an example of the use of the "big stick." The landing of forces in Latin-American countries was, in several instances, justified by President Roosevelt under the doctrine of an "international police power," which is a positive interpretation of the Monroe Doctrine. See his message to Congress, *For. Rels. of U. S.*, 1904, p. XLI.

CHAPTER XVI

THE BEGINNING OF WAR

UNDER this head we have to consider the respective powers of the President and of Congress in connection with the outbreak of such armed conflicts between the United States and foreign powers as are accompanied by a formal declaration of war on our side or, at all events, are of such a nature as properly to be denominated wars. In most countries the power to declare war is lodged in the executive, although parliamentary support is necessary for the prosecution of hostilities. The framers of our Constitution preferred, however, a different arrangement. They were establishing a representative form of government, hence they deemed it better that the power of initiating war, which so profoundly affects the lives and fortunes of the mass of the people, should be in the hands of that branch of the Government which was conceived to be most broadly representative, namely, Congress. As Madison wrote at the end of the eighteenth century, "The Constitution supposes what the history of all governments demonstrates, that the Executive is the branch of power most interested in war and most prone to it. It has accordingly, with studied care, vested the question of war in the Legislature."[1] The decision was influenced also by regard for the principle of separation of powers, it being deemed preferable that the declaration of war and its prosecution should be intrusted to different branches of the Government.

There was, it is true, some difference of opinion in the convention. Butler favored vesting the power of making

[1] *Writings* (Hunt ed.), VI, 312.

war in the President, in the confidence that he would not use it save when the nation would approve. Gerry, however, averred that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." [1] Mason also opposed giving the war power to the Executive on the ground that he could not be trusted with it; likewise, he opposed the suggestion of Pinckney that the Senate would be the best depository, on the ground that that body "was not so constructed as to be entitled to it." [2] The provision at first stood, "to make war"; but, on motion of Madison and Gerry, this was amended so as to read, "to declare war," thus "leaving to the Executive the power to repel sudden attacks." Congress was to have the power of formally changing the condition of the country from peace to war by issuing a declaration to that effect, while the President, as commander-in-chief, was to conduct wars so declared and to fend off sudden attacks by initiating defensive operations.

As is indicated in the preceding chapter, there have been many occasions upon which the President has found it necessary to use force in or against foreign countries without a formal declaration of war by Congress; and some of these actions have differed so little from actual war that, in the material sense at least, they can scarcely be distinguished from it.

THE POLICY OF ARMED NEUTRALITY

In order to protect our rights and interests as a neutral in the midst of war between foreign nations, without taking the extreme step of declaring war, we have at times essayed to adopt the policy of armed neutrality. This policy might, with some show of reason, be considered a form of the use of force short of war. But, as it has, in important instances, failed to avert war, it may appropriately be con-

[1] *Journal of the Constitutional Convention* (Hunt ed.), II, 188.
[2] *Ibid.*

sidered in the present connection. Such armed neutrality is, in fact, scarcely distinguishable in its incidents and effects from qualified, partial, or limited war. In 1798, during our controversy with France over neutral rights, President Adams informed Congress that he felt no longer justified in continuing the instructions to collectors of customs to restrain vessels of the United States from sailing in an armed condition.[1] This announcement aroused some controversy over the President's constitutional power,[2] but Congress subsequently passed several acts which together authorized partial hostilities against France. Among them was the act of July 9, 1798, which authorized the President to instruct the commanders of public armed vessels of the United States to capture armed French vessels, and also authorized him to issue special commissions, or letters of marque and reprisal, to the owners of private armed vessels of the United States for the same purpose.[3] Thus we resorted to partial hostilities and to privateering in maintaining our rights against France. But there was no formal declaration of war.

In a case arising in the Supreme Court involving the relations between the United States and France in 1799, Justice Washington distinguished between a limited or imperfect and a general or perfect war, solemnly declared. He maintained that the existing difficulty with France belonged to the former class, and that Congress did not issue a formal declaration, because that "might have constituted a perfect state of war, which was not intended by the government."[4] There is still room for difference of

[1] Richardson, *Mess. and Pap. of the Presidents,* I, 265.

[2] Cf. Madison's *Writings,* VI, 313.

[3] 1 Stat. at L., 578; reprinted in J. B. Scott [ed.], *The Controversy over Neutral Rights Between the United States and France, 1797-1800,* 65-66. Cf. G. G. Wilson, "Limited Use of Force," *Am. Jour. of Internat. Law,* XI, 384-387 (Apr., 1917).

[4] Bas *v.* Tingy, 4 Dall, 37; Talbot *v.* Seeman, 1 Cranch, 1; J. B. Scott, *The Controversy over Neutral Rights Between the U. S. and France,* 110. Cf., however, the opinion of Attorney-General Lee in 1798 that there existed an "actual maritime war between the United States and France." 1 Op. Att.-Gen., 84, Aug. 21, 1798.

opinion as to whether the measures taken against France at this time shall be regarded as war or as the use of force short of war.

Again in 1917, when diplomacy had failed to secure respect for our rights by Germany, and diplomatic relations with that country had been severed, President Wilson appeared before a joint session of Congress and declared: "Since it has unhappily proved impossible to safeguard our neutral rights by diplomatic means against the unwarranted infringements they are suffering at the hands of Germany, there may be no recourse but to *armed* neutrality, which we shall know how to maintain and for which there is abundant American precedent."[1] To meet these circumstances, the President requested Congress to authorize him "to supply our merchant ships with defensive arms and with the means of using them and to employ any other instrumentalities or methods that may be necessary and adequate to protect our ships and our people in their legitimate and peaceful pursuits on the seas."[2] As showing his attitude toward the question of legal power involved, the President added: "No doubt I already possess that authority without special warrant of law, by the plain implication of my constitutional duties and powers; but I prefer, in the present circumstances, not to act upon general implication. I wish to feel that the authority and the power of the Congress are behind me in whatever it may become necessary for me to do. We are jointly the servants of the people and must act together and in their spirit, so far as we can divine and interpret it."[3]

A bill was thereupon introduced in the House of Representatives with a view to granting the President the desired authority. It passed in that body, but failed in the Senate on account of a filibuster carried out just prior to

[1] Cong. Record, February 26, 1917, vol. 54, p. 4273.
[2] *Ibid.*
[3] *Ibid.*

the termination of the session by constitutional limitation. It was opposed in both branches on the ground that it undertook to transfer and delegate to the President the war power of Congress.[1] In view of the fact, however, that the President, as commander-in-chief of the navy, could have directed our war-ships to convoy our merchant ships along the lanes of high sea travel, and to protect them against unlawful attack, the objection of unconstitutionality seems ill-founded.[2] That the President himself held this view is evidenced by his action in carrying out the proposed arming of merchant ships in spite of the failure of Congress to pass the bill. Armed neutrality did not in this case avert war. But it failed, not through any choice on our part, but on account of the fact that war was thrust upon us by the German government.

CLASSIFICATION OF ARMED CONFLICTS

Some authorities enumerate eight foreign wars to which the United States has been a party since the adoption of the Constitution, including the difficulties with France and the Barbary states in which formal declarations of war were not issued by Congress.[3] Other writers are inclined to classify our conflict with France as the adoption of forcible measures short of war.[4] It is evident that the distinction between those conflicts which may be properly

[1] Cong. Record, 64th Cong., 2d sess., pp. 4637-8, 4652, 4772-3, 4878.

[2] The question might, however, have been raised whether the project to arm our merchant vessels did not virtually amount to privateering. The power to grant letters of marque and reprisal is, by the Constitution, specifically lodged in Congress, and in 1835 the Senate committee on foreign relations was not satisfied that the power could be delegated to the President. (Moore, *Digest of Internat. Law*, VII, 127.) Privateering, it is true, was abolished by the Declaration of Paris in 1856; but the United States was not a party to this Declaration, although it has since conformed its conduct to it.

[3] S. E. Baldwin, "The Share of the President in a Declaration of War," *Am. Jour. of Internat. Law*, XII, 2 (Jan., 1918); cf. Moore, *Digest of Internat. Law*, VII, 168.

[4] Stowell and Munro, *International Cases*, II, 3-7; *Webster's Works*, IV, 163-5; and Gray *v.* U. S., 21 Ct. Cl., 340, cited in Moore, *Digest of Internat. Law*, VII, 158.

termed wars and those which fall short of war is not sharp; some conflicts fall on the border line, so that there may be a difference of opinion as to their true nature. The landing of American troops at Vera Cruz in 1914 is not commonly considered as constituting a war, although the Mexican foreign minister handed our *chargé d'affaires* his passports with a note stating that "according to international law, the acts of the armed forces of the United States . . . must be considered as an initiation of war against Mexico."[1] War against Mexico, however, was not intended by our Government, the sole object being reprisals. Nor did we intend war against China when we sent an armed expedition to Peking in 1900, although that undertaking had many of the outward marks of war in the material sense, and the period was held by a lower federal court to constitute a "time of war," within the meaning of the article of war providing for the trial by military court-martial of certain offenses committed by soldiers in time of war.[2] As was stated by the Court of Claims in 1909, "while reprisals are acts of war in fact, it is for the state affected to determine for itself whether the relation of actual war was intended by them."[3] Any exclusive list, therefore, of wars waged by the United States against foreign states will be somewhat arbitrary. For present purposes, it will suffice to include in such a list our conflicts with France, Tripoli, Algiers, Great Britain, Mexico, Spain, and Germany and Austria-Hungary.

THE PROCESS OF DECLARING WAR

It has been pointed out that there are "three stages in proceedings for declaring war by the United States. The

[1] *American Year Book*, 1911, p. 35.

[2] Hamilton *v.* McClaughry, 136 Fed., 445.

[3] The Schooner *Endeavor*, 44 Ct. Cl., 242, quoted by G. G. Wilson in *Am. Jour. of Internat. Law*, XI, 387 (Apr., 1917). Cf. the statement of President Wilson that the expedition into Mexico after the Columbus raid of 1916 was undertaken "in entirely friendly aid of the constituted authorities of Mexico," *Am. Jour. of Internat. Law*, X, Supp., 184 (Apr., 1916).

first comes with the doings of the President in informing Congress of the state of our relations with the power against which war may be declared. The second is the doings of Congress in making the declaration, and the third is the approval of the declaration by the President."[1] We may consider each of these in turn.

The power of changing the condition of the country from peace to war by formal declaration rests, under the Constitution, with Congress. But an intelligent decision upon a policy of peace or war requires information and touch with foreign affairs and relations, such as the President, as the officer of the government charged with the conduct of foreign intercourse, will be more likely to have than will Congress. Indeed, as our points of contact with other nations become more numerous, the President necessarily takes over, in an increasing degree, control over the determination of war or peace, in spite of the legal conferment of this power by the Constitution upon Congress.

Interesting light of an almost contemporaneous character is thrown upon the meaning to be attached to the constitutional provision concerning the declaration of war by the debates which took place in Congress in 1798 in connection with our relations with France, then closely approaching war. In March of that year, President Adams informed Congress that dispatches which he had received indicated that the objects of the mission to France—ordinarily known as the "XYZ" mission—could not be accomplished on terms compatible with the safety, honor, or essential interests of the nation. He therefore recommended that Congress adopt measures of defense and, as indicated above, informed that body that he had withdrawn the instructions to collectors to restrain vessels of the United States from sailing under arms.[2]

This message was regarded by many members of Con-

[1] S. E. Baldwin, in *Am. Jour. of Internat. Law*, XII, 10 (Jan., 1918).
[2] Richardson, *Mess. and Pap. of the Presidents*, I, 264-5.

gress as directly pointing to war, and it led to the introduction in the House of Representatives of two resolutions, one opposing war and the other requesting further information. The first resolution declared that "under existing circumstances, it is not expedient for the United States to resort to war against the French Republic," and that provision ought to be made by law for restricting the arming of merchant vessels, except as previously permitted.[1] The last-mentioned clause represented an attempt on the part of members who opposed the war to take from the President one means of engaging in warlike measures in a way which might bring on a general war.[2] The first clause was an attempt on the part of the same element to make an express declaration in opposition to what was deemed by many as the President's evident inclination toward a war with France. The wording of the declaration was based on the idea that Congress not only should be "the instrument to give the sound of war," as one member expressed it, but should control the whole subject.[3] Mr. Nicholas expressed the view that "Congress had the power over the progress of what led to war, as well as the power of declaring war, but if the President could take the measures which he had taken, with respect to arming merchant vessels, he, and not Congress, had the power of making war."[4]

To some it seemed superfluous, if not harmful, for Congress to make a negative declaration. One member put it thus: "So long as the Congress shall forbear to declare war, it is a sufficient expression of their sentiment that such a declaration would be inexpedient: it is the only proper expression of such a sentiment."[5] In a letter to Jefferson, Madison, however, while admitting that such a

[1] Annals of Cong., 5th Cong., cols. 1319, 1320.
[2] In a letter to Jefferson, Madison expressed the view that "Congress ought clearly to prohibit arming." *Writings* (Hunt ed.), VI, 313.
[3] Annals of Cong., 5th Cong., col. 1321.
[4] *Ibid.*, col. 1324.
[5] *Ibid.*, col. 1320.

negative declaration is ordinarily ineligible, argued that it might be proper in certain cases.[1] The present negative resolution, however, failed to pass. It was clearly an attempt on the part of those members of Congress who sponsored it to restrict the President's power over the beginning of war. Although a formal declaration of war was not adopted, it doubtless would have been adopted if the President had recommended it, and the failure of the negative resolution is significant as showing the strength of the President's position.

The second resolution provided "that the President be requested to communicate to this House the instructions to and dispatches from the envoys extraordinary of the United States" to France, mentioned in the President's message.[2] These were the famous "XYZ" papers, whose contents bore directly upon the question of peace or war which it was deemed the business of Congress to decide. Members of the House complained that they were left in the dark as to the contents of these dispatches, with the result that they lacked the information necessary to an intelligent decision. The question involved was, in principle, similar to that which arose over the request of the House that the President transmit the papers connected with the Jay Treaty with a view to assisting that body in arriving at a decision as to an appropriation for carrying the instrument into effect. In both instances the House was called upon to perform a constitutional function which it felt able to exercise intelligently only if it were put in possession of information which the President alone could supply. In

[1] He mentions the following cases: "1. Where nothing less than a declaration of pacific intentions from the department entrusted with the power of war, will quiet the apprehensions of the constituent body, or remove an uncertainty which subjects one part of them to the speculating arts of another. 2. Where it may be a necessary antidote to the hostile measures or language of the Executive Department. . . . 3. Where public measures or appearances may mislead another nation into distrust of the real object of them, the error ought to be corrected; and in our Government, where the question of war or peace lies with Congress, a satisfactory explanation cannot issue from any other departments." *Writings* (Hunt ed.), 317-8.

[2] Annals of Cong., 5th Cong., col. 1370.

the case of the "XYZ" papers, however, no definite obligation, in an international sense, had been created by another organ of the Government to adopt any particular course of action. In this case, moreover, when it appeared that the resolution requesting the papers had passed the House by a substantial majority,[1] the desired documents were promptly transmitted to both branches by the President, "omitting only some names and a few expressions descriptive of the persons." [2]

In the House debate some expressions were used to the effect that the body had a constitutional right to demand the papers and to require their transmission, since otherwise its constitutional power of declaring war would be rendered nugatory. The better view, however, was expressed by Mr. Gallatin, who declared that the House had no control over the President in this respect. He was in favor of acting without requesting further information, since he did not know "that it would be given, or, if given, whether it would not be in a mutilated state." [3]

The points involved in this controversy had been considered to some extent in the debate between Hamilton ("Pacificus") and Madison ("Helvidius") over Washington's proclamation of neutrality. Madison argued that, by virtue of its power to declare war, Congress had also the power of judging whether the United States is obliged to declare war, while the President is excluded from the right of so judging. Hamilton correctly contended, however, that, even though Congress may have such a right of judgment, it does not follow that the President "is excluded from a similar right of judgment in the execution of his own functions." [4] The President, moreover, occupies the strategic position in the matter. In case he declines to transmit papers demanded by Congress, there is admittedly no way of

[1] Annals of Cong., 5th Cong., col. 1371.
[2] Richardson, *Mess. and Pap. of the Presidents*, I, 265.
[3] Annals of Cong., 5th Cong., col. 1363.
[4] Quoted in Corwin, *President's Control of Foreign Relations*, 12, 21.

securing them, save by the laborious method of impeachment. Any attempt on the part of Congress to secure from the President full information upon which to base a decision as to declaring war is likely to encroach upon that officer's diplomatic powers, *e.g.*, those connected with his instructions to commissioners and the results of diplomatic negotiations. Whether or not the President will communicate such information lies entirely within his discretion, and will be determined in accordance with his ideas of policy and expediency. The result is that, in practice, the President, through his control of essential information, can usually manipulate the situation, if he desires, so as to secure or prevent a declaration of war by Congress.[1]

In the debate on the armed neutrality bill of 1917, Senator Stone, after calling attention to the disuse into which the issuance of formal declarations of war had fallen, affirmed that in order to prevent the country from being thrust into a state of actual war without any action of Congress whatever, it would be necessary for that body to take the position that "nothing can be done to inaugurate or initiate war until Congress first authorizes it."[2] Senator Cummings argued in the same strain when he said that "it is for Congress to determine the character of an act and to declare to the world whether the act is sufficient to bring on war."[3] These contentions were doubtless in accordance with the constitutional theory of Congressional participation in war-making. But they ignored the practical aspects of the matter—aspects which were duly taken note of by Senator Lodge, when, in the same debate, he declared that "the President, under his constitutional powers, can, if he choose, get the country into war. As Mr. Webster said on one famous occasion, 'nobody declared the Mexican

[1] Cf. Madison's statement in a letter to Jefferson in 1798 that measures "may be taken by the Executive that will end in war, contrary to the wish of the body which alone can declare it." *Writings* (Hunt ed.), VI, 314.

[2] Cong. Record, March 3, 1917, vol. 54, p. 4879, citing *Tucker on the Constitution*, II, 577.

[3] *Ibid.*, p. 4911.

War; Mr. Polk made it.' The President can do that without any resolution of Congress."[1]

Warlike operations on a considerable scale are possible, as we have seen, without a declaration of war by Congress, and, indeed, without any specific action whatever by that body, as in the case of the Boxer expedition of 1900. The only way in which Congress could prevent operations of this sort would be by failing to make any financial provision for military or naval armament, which, under existing conditions, it cannot afford to do. As long as such armament exists, the President, by virtue of his position as commander-in-chief of the army and navy, can on occasion use it to conduct operations which may result in war. The United States may be attacked; and it then becomes the duty of the President to recognize the state of war and to ward off invasion without waiting for special legislative authorization. Practically, the President has the power to bring on a war which may colorably be denominated defensive but which in is reality aggressive. The distinction between defensive and offensive warfare is, in fact, rather illusory.

Although there was much opposition, both in Congress and in the country, to the Mexican War—the war which Webster declared that President Polk made—nevertheless it would seem that, technically, the President was acting within his legal and constitutional powers in the measures which he took in the early stages of that conflict. Two battles, Palo Alto and Resaca de la Palma, were fought in May, 1846, before Congress declared the existence of a state of war. They took place on territory north of the Rio Grande which Mexico claimed. By act of the Texan Congress, passed in 1836, this territory, however, belonged to that state, which in 1845 was incorporated in the United States. Furthermore, Congress, in the last-mentioned year, gave its implied sanction to the theory that our southwest-

[1] Cong. Record, March 2, 1917, p. 4751.

ern border was the Rio Grande by passing an act extending the revenue laws of the United States over the territory north of that river. Under these circumstances, it would seem fairly clear that the President was not acting *ultra vires* in defending the territory in dispute from invasion, and that he might well have been accused of neglect of duty if he had not done so. Nevertheless, it is doubtless true that he was not averse to war; he may even be regarded as having manipulated the situation so as to bring on hostilities.[1]

Not only through his military powers, but also through the exercise of his diplomatic functions, the President may bring about a situation leading directly to war. Thus in the conduct of diplomatic negotiations he may insist not only firmly but aggressively upon what he conceives to be our national rights, as in the case of the disputed interpretation of a treaty, and may decline to submit the dispute to arbitration. He may bring on a diplomatic *impasse* by sending an ultimatum to a foreign government with which we are in disagreement, and he may sever diplomatic relations with such a government altogether, a step which is a frequent preliminary of war.[2] Moreover, through his power to receive diplomatic envoys he may recognize the belligerency or independence of the revolting colonies of a government with which we are at peace, thus furnishing to that government a *casus belli*. And if, through any of these means, he precipitates hostilities with another power, Congress cannot afford to refuse support, even though it feels that a less aggressive diplomatic policy would have averted the conflict altogether. In the case of the Mexican War, as previously indicated, the President's policy was vigorously

[1] For the debate in Congress on the President's policy, see Benton, *Abridgment*, XV, 489-504, and compare Reeves, *American Diplomacy under Tyler and Polk*, 272-298.

[2] Thus, diplomatic intercourse with Mexico was suspended for more than a year and with Germany for about two months before the outbreak of war with those countries.

opposed in Congress, especially by the Whigs; but very few members withheld their support from its prosecution.[1]

By virtue of the President's constitutional authority to convey to Congress information on the state of the Union and to recommend to that body the consideration of such measures as he shall judge necessary and expedient, it becomes his duty to recommend that Congress take appropriate action whenever our relations with another power become such that diplomatic means are no longer adequate to maintain our international rights and national honor. If during a recess of Congress the situation becomes so acute as not to admit of delay, it is his duty to call a special session; although this has been found necessary only in the case of the war with Germany.

The extreme view of the extent of Congressional power over the beginning of war was thus expressed by Senator Bacon in his debate with Senator Spooner in 1906: "The President not only cannot declare war, and it is not only conferred in terms upon Congress, but even if the President should be opposed to a proposed war, two-thirds of each branch can declare war. It would not require his approval. There is the most important of all foreign relations. It does not belong to the President."[2]

This is theoretically true, but the practical facts are diametrically the opposite. It may be accepted as an established "convention" of the Constitution that, although Congress has full legal power to declare war without regard to the President's wishes, and may even pass such declaration over his veto by a two-thirds vote as in the case of any other act, nevertheless it will not pass such an act in the first place unless assured of the support and approval of the President as indicated by his express or virtual recom-

[1] On January 3, 1848, however, a joint resolution passed the House of Representatives by the close vote of 85 to 81 declaring that the Mexican War had been "unnecessarily and unconstitutionally begun by the President." Cong. Globe, 30th Cong., 1st sess., p. 95. An attempt on February 14 of the same year to rescind this resolution was defeated by 105 to 94. *Ibid.*, 344.

[2] Quoted in Corwin, *President's Control of Foreign Relations*, 191.

mendation that such a declaration be issued. The President has control of diplomatic intercourse and of the sources of official information regarding foreign relations. Congress has nothing of the sort. Moreover, Congress is dependent upon the President, as commander-in-chief, to prosecute any war that it may declare. Hence, the power of that body to declare war can be correctly appraised only when considered in connection with the President's powers touching the beginning of war. These latter powers are both positive and negative. Positively, the President may, through the exercise of his diplomatic and executive powers, bring on a situation such that Congress, even against its wishes, will be practically compelled to support his war policy. Negatively, he may prevent a declaration of war by Congress by declining to recommend or approve it.

On the other hand, it is true that Congress, if inclined to war, may bring such pressure to bear on a President desirous of avoiding war as practically to force his hand. Thus, prior to our entrance into the war of 1812 with Great Britain a group of men in Congress, known as the "war hawks," agitated in favor of war, and as a result of their efforts acts were passed tending to put the country in a state of preparation for the contemplated hostilities.[1] President Madison was averse to war, although resentful of the aggressive acts of Great Britain against our ships and commerce. On April 1, 1812, he recommended to Congress that a general embargo be laid on all vessels then in port, and two months later he sent in a message enumerating our grievances.[2] The tone of the message suggested war, although the President did not expressly recommend a declaration of war, but rather only that Congress give its

[1] If, as has often been argued, the mere existence of large armaments is a potent cause of war, then, to that extent, Congress may greatly assist in bringing on war by providing such armament.

[2] With regard to Congressional pressure on President Madison, it is to be remembered that this could be the more easily exerted in 1812, since the President was dependent for his renomination upon the action of the Congressional caucus.

consideration to the question. "Whether," he said, "the United States shall continue passive under these . . . accumulating wrongs" or oppose "force to force in defense of their national rights . . . is a solemn question which the Constitution wisely confides to the legislative department of the Government."[1] In other cases, however, where Congress has formally declared war, the President has taken a more positive stand and has expressly recommended such a declaration. It may be said, therefore, that Congress has never declared war except in pursuance of the express or implied recommendation of the President, and with the assurance of his support and approval. It is not to be inferred, however, that the constitutional "convention" whereby the President takes the initiative in recommending a declaration of war has deprived Congress of all judgment and discretion in the matter, or should be permitted to do so.

In the debate on the armed neutrality bill of 1917 Senator Stone declared that "Congress only can constitutionally pass upon the sufficiency of a cause of war."[2] However true this may be from the theoretical point of view, the practical fact is that the President, through his initiative in recommending war, passes in the first instance upon the sufficiency of the cause, subject to the approval of Congress. Usually the causes of war are well known to the public; and of course the President and Congress require the support of public opinion in such an emergency as may lead to war. The President, however, as we have seen, is in control of the sources of official information and may have facts in his possession which are not generally known. It is customary for him, especially when he is in harmony politically with the majority of Congress, to keep that body, or at least the chairmen of the Committees on Foreign Relations and Foreign Affairs, informed of any

[1] Richardson, *Mess. and Pap. of the Presidents*, I, 504-5.
[2] Cong. Record, March 3, 1917, vol. 54, p. 4880.

developments of a threatening nature which may require the action of Congress. When the moment arrives at which he deems that the resources of diplomacy in settling an international difference have been exhausted and that the peace and the honor of the country cannot both be longer preserved, it is his duty to transmit to Congress such information regarding the state of our foreign relations as may enable that body to form an intelligent judgment upon the nature of our grievances and their sufficiency as ground for a declaration of war.

THE SPECIFICATION OF CAUSES

It has been customary for Presidents to inform Congress concerning developments of a threatening nature, not only in the final message recommending a declaration of war, but also during the preliminary stages of the controversy. Thus on March 9, 1812, more than three months before the actual declaration of war, President Madison communicated to Congress certain documents tending to show that Great Britain, while professing friendship for us through her public minister at Washington, was maintaining a secret agent in this country to foment disaffection toward the constituted authorities.[1] Again, on April 19, 1916, almost a year before Congress declared a state of war with Germany, President Wilson delivered an address before the two houses in which he recounted the notorious submarine outrages for which Germany was responsible, notably the *Sussex* affair, and informed Congress of his intention to sever diplomatic relations with the Imperial Government altogether unless it promised and effected an immediate abandonment of its methods of warfare. More than a month, also, before the declaration, Congress—as well as the world at large—was informed by the State Department of the contents of the astonishing Zimmermann note, pro-

[1] Richardson, *Mess. and Pap. of the Presidents*, I, 498.

posing an alliance of Germany, Mexico, and Japan against the United States.

The official statement of the causes of war, however, is usually found in the message in which the President recommends to Congress the passage of a formal declaration. Thus in his address to Congress on April 2, 1917, President Wilson recounted the grievances of the United States against Germany—the sinking of American ships, the destruction of American lives, the sending of spies and intriguers among us, and other hostile acts. In addition to this enumeration, he spoke of certain great objects for which we should fight, *e.g.*, "the rights of nations great and small and the privileges of men everywhere to choose their way of life and of obedience," and "to make the world safe for democracy." Thus, in addition to defending our own international rights, which had been violated by Germany, we were to exert our might as the champion of humanity and of the rights of men everywhere. This was a large undertaking, and although the President assumed to speak for the Government and for the entire nation, Congress did not go so far. The joint resolution of April 6, 1917, passed in pursuance of the President's recommendation and declaring the existence of a state of war with Germany, provided merely that "whereas the Imperial German Government has committed repeated acts of war against the Government and people of the United States: therefore, be it resolved, that the state of war between the United States and Germany which has thus been thrust upon the United States is hereby formally declared," etc.[1] Nothing was said about fighting for democracy or the rights of humanity. It may be noted also that the report of the House Committee on Foreign Affairs, although enumerating a long list of grievances against Germany, did not base its recommendation on the broader reasons assigned by

[1] 40 U. S. Stat. at L., 1. The joint resolution of December 7, 1917, declaring a state of war with Austria-Hungary used substantially the same phraseology. 40 Stat. at L., 429.

the President.[1] It may be argued that Congress gave its tacit consent to these broader reasons. It hardly seems, however, that it was necessarily committed to them. At all events, at a time when undivided counsels and the utmost coöperation were eminently desirable, it neither affirmed nor denied them.[2]

The issuance of a formal declaration of war has not commonly been considered necessary in international law, and in practice many wars have been begun without a declaration. Under a provision of the Hague Convention of 1907, however, which the United States ratified, it was agreed that hostilities "must not commence without previous and explicit warning in the form either of a reasoned (*motivée*) declaration of war or of an ultimatum with conditional declaration of war."[3] In the two instances of a declaration of war by Congress since the ratification of the Hague Convention, the statement of reasons contained in the formal declaration is so general as hardly to comply, apparently, with these requirements. In both cases, however, war had already been thrust upon us by the Central Powers, so that no element of surprise was involved; and, in view of the statement of facts in the President's address and in the report of the Congressional Committee, no further elaboration in the formal declaration seemed neces-

[1] See synopsis of this report in *Am. Jour. of Internat. Law,* XI, 623-6 (July, 1917).

[2] In regard to the grounds upon which Congress declared war, compare the following colloquy which occurred in the Senate on May 13, 1920:

"MR. BRANDEGEE. Instead of entering the war on broad principles of altruism and of service to humanity, were we not month after month alleged to be waiting for the Germans to perform an overt act against us? Was not that the daily suggestion in the newspapers that at last, perhaps, an overt act would be committed?

"MR. THOMAS. That is absolutely true. It was the attitude of my party, whose declarations at St. Louis were to that effect, and while in connection therewith we announced our purposes and our lofty intentions toward all the world, including our enemies, the fact remains that the people of the United States responded to the war because of the outrages inflicted upon their fellow citizens, which demonstrated the need for war if we were to preserve our country from a foreign invader, sure to come, once he had broken down the barriers of an intervening ocean." Cong. Record, May 13, 1920, p. 7590.

[3] J. B. Scott, *Texts of the Peace Conferences at the Hague,* 199.

sary. In declarations of war issued prior to the adoption of the Hague Convention, Congress was usually even more reticent concerning the precise reasons for the action taken.[1] The joint resolution of April 20, 1898, however, although in form an ultimatum demanding, among other things, the withdrawal of Spain from Cuba, was virtually a declaration of war, and it contained in its preamble a reference to the "abhorrent conditions" existing in Cuba, "culminating in the destruction of a United States battleship [*Maine*] with 266 of its officers and crew and cannot be longer endured, as has been set forth by the President in his message to Congress of April 11th, upon which the action of Congress was invited."[2] The formal declaration embodied in an act of April 25th, merely declared the existence of a state of war since the 21st, inclusive, without specifying any farther reasons or causes.[3] Meanwhile, on the 22nd, the President had issued a proclamation declaring a blockade of the northern coast of Cuba,[4] which may be regarded as virtually a presidential declaration of war, issued prior to the formal declaration by Congress.

The Hague convention of 1907, quoted above, represented an attempt of the treaty power to exercise some control over the war power. Although as a party to that convention the United States assumed an obligation, in an international sense, to comply with its terms, Congress is not thereby bound, in a constitutional sense, to state the reasons for a declaration of war; in conferring on Congress the power to declare war, the Constitution does not require that the declaration shall be accompanied by reasons.[5] It is a fair inference from the Constitution's language that

[1] See Act of June 18, 1812, 2 Stat. at L., 755; act of May 13, 1846, 9 *ibid.*, 9; act of April 25, 1898, 30 *ibid.*, 364.

[2] 30 U. S. Stat. at L., 738.

[3] *Ibid.*, 364.

[4] *Ibid.*, 1769.

[5] It is true that international law, which requires that treaties duly made shall be faithfully observed, has been held to be to some extent a part of our law (*The Paquette Habana*, 175 U. S., 677). But this would hardly be held to be so far true as to limit the constitutional discretion of Congress.

reasons may be stated in the declaration. But whether this shall be done is, constitutionally, for Congress to determine, and this discretion cannot be taken away or restricted by treaty. The American delegation to the Hague Conference pointed out that Congress, under the Constitution, has exclusive power to declare war, and that such power is "not susceptible of regulation or modification by law or treaty," [1] although no express reservation to this effect was included by the United States in the act of ratification. Certain articles of the Covenant of the League of Nations, if ratified by the United States, might also place this country, in an international sense, under an obligation to go to war in case certain circumstances arose. In the constitutional sense, however, Congress would not thereby be obliged to declare war, since the treaty power is incapable of limiting that body's constitutional discretion in the matter.

Congress has uniformly worded its declarations of war in such a way as to imply that war already existed at the time of the issuance of the declaration, rather than that it was to begin upon such issuance. This is notably illustrated in the declaration of war against Mexico, which was entitled "an act providing for the prosecution of the existing war" between the United States and Mexico, and which, in a preamble, recited that "by the act of the Republic of Mexico, a state of war exists between that Government and the United States." [2] Speaking strictly, this action might be more properly characterized as a Congressional recognition of a state of war than as a formal declaration of war. In fact, as Judge Baldwin points out, a motion in the House of Representatives for a declaration of war was rejected by a large majority.[3] It was, however, possible to muster a majority to support the President in a war already going on, even though many members believed that the conflict had been begun by the President while acting in

[1] *Am. Jour. of Internat. Law*, II, 65.
[2] 9 U. S. Stat. at L., 9.
[3] *Am. Jour. of Internat. Law*, XII, 2.

excess of his powers. A resolution to this latter effect was, as we have seen, adopted by the House during the next session.[1]

In the case of our wars with Tripoli and Algiers, there were also Congressional recognitions of a state of war, although, as already indicated, no formal declarations of war were issued. In 1801 Tripoli declared war against the United States, and President Jefferson, as we have seen, sent a small squadron of frigates into the Mediterranean, without Congressional authorization, with orders to protect our commerce against the threatened attack.[2] On February 6, 1802, Congress passed an act which, after reciting that "the regency of Tripoli, on the coast of Barbary, has commenced a predatory warfare against the United States," provided that "it shall be lawful for the President to instruct the commanders of the armed vessels of the United States to subdue, seize and make prize of all vessels, goods and effects belonging to the Bey of Tripoli, or to his subjects . . . and also cause to be done all such other acts of precaution or hostility as the state of war will justify and may in his opinion require."[3] The act also authorized privateering, or the granting of letters of marque and reprisal to owners of private armed vessels. An act of March 3, 1815, with reference to the Bey of Algiers was of a similar tenor.[4] As Secretary Fish later pointed out, these measures constituted virtual declarations of war.[5]

PRESIDENTIAL APPROVAL OF DECLARATIONS OF WAR

The final stage in the process of declaring war, as in making a treaty, is normally in the hands of the President. The Congressional declaration is sometimes in the form of

[1] Cong. Globe, 30th Cong., 1st sess., Jan. 3, 1848, p. 95.
[2] Moore, *Digest of Internat. Law*, VII, 162.
[3] 2 Stat. at L., 129.
[4] 3 Stat. at L., 230.
[5] Moore, *Digest of Internat. Law.*, VII, 168.

an act and sometimes in that of a joint resolution. But in either case it is subject to the President's power to approve or to veto, as is other legislation. The President has, however, never exercised his power of veto in the case of a declaration of war, and it is hardly probable that he will find occasion to do so, at all events as long as Congress continues the policy of not adopting a declaration of war except upon the President's recommendation. As in the case of other bills, the President cannot veto a part of a declaration of war, but must approve or veto the whole. If the causes of war as stated in the proposed act or joint resolution are decidedly at variance with the Executive's views, he might, therefore, conceivably be led to impose a veto, even though he had recommended a declaration. But he would hardly be inclined to quarrel over a difference of opinion of this sort, since it is the result that he is mainly interested in, and since, once the declaration is issued, his powers are the same without regard to the statement of causes by Congress.

When a declaration of war has been signed and approved, it is not necessary for the President to notify the enemy government of that fact. Diplomatic relations with that government have usually already been severed. He may, however, notify neutrals; indeed, under the Hague convention relative to the opening of hostilities, belligerents are required to notify neutrals promptly at the outbreak of war, and the war has no effect so far as they are concerned until the receipt of notification.[1] As the organ of communication with foreign governments, the President naturally transmits such notification.

A declaration of war by Congress fundamentally affects the rights and duties of the citizens of the United States. There is no constitutional or legal requirement, however, that any special notification shall be given them, other than that which they receive in the case of other acts of Con-

[1] Malloy, *Treaties*, etc., 2266.

gress. But, on account of the importance of an outbreak of war, the President usually notifies citizens by a formal proclamation,[1] and he may, in a similar manner, notify alien residents of the country as to their rights and duties.[2]

The prosecution of war, once it is declared, is almost entirely under the control of the President, subject to the necessity of securing the financial support of Congress. The latter body cannot, through its military powers, take the conduct of the war and the direction of the forces out of the President's hands. It can, of course, withhold appropriations. But it is doubtful whether it can indirectly control the President's power as commander-in-chief to direct the movement of the forces through provisions in appropriation bills making funds available for the support of the army only on condition that it is employed in a certain way or upon certain territory.[3] At any rate, after war has been declared against a particular country, the President, in the absence of Congressional prohibition, may send troops to any part of the world if, in his judgment, such action will serve any useful purpose in connection with the prosecution of the war against the country which has been the object of the declaration. Thus during the European war President Wilson sent troops to Russia, although we were not at war with that power.[4]

[1] See, for example, President Madison's proclamation of June 19, 1812; Richardson, *op. cit.*, I, 512.

[2] See President Wilson's proclamation of April 6, 1917, reprinted in *Am. Jour. of Internat. Law*, XI, supp. p. 152-6 (July, 1917). The act of Congress of July 6, 1798, relating to the removal of alien enemies apparently assumes that the President will issue such a proclamation. U. S. Revised Statutes, sect. 4067; 1 Stat. at L., 577.

[3] Cf. a proposed amendment to the army appropriation bill of 1912 to this effect, Cong. Record, August 14, 1912, vol. 48, p. 10921. See also the debate with regard to the respective control of the President and Congress over the army, Cong. Record, April 16, 1920, vol. 59, pp. 6206-8.

[4] During the sixty-sixth Congress a resolution was introduced by Representative Mason, of Illinois, directing the President to withdraw our troops from Europe and Siberia. But the House committee on military affairs, after investigating the constitutional questions involved, decided to take no action on the resolution. Cong. Record, April 16, 1920, vol. 59, p. 6207; *ibid.*, p. 6652: See also the message of the President in response to a Senate resolution regarding the armed forces in Siberia, July 25, 1919. Sen. doc. 60, 66th Cong., 1st sess.

Whether Congress can declare war and then compel an unwilling President, by threat of impeachment, to exercise his powers as commander-in-chief of the army and navy in the prosecution of the conflict, is a question which has never arisen in a practical form, although a somewhat analogous problem presented itself in connection with the efforts of Congress to compel the reluctant President Johnson to enforce the reconstruction acts providing for military government of the ex-Confederate states. Such a question can hardly arise in connection with a foreign war so long as Congress maintains its well-established policy of not declaring war except upon the President's recommendation.

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CHAPTER XVII

THE TERMINATION OF WAR

THE CESSATION OF HOSTILITIES

THE termination of war must, at the outset, be distinguished from the mere cessation of hostilities or actual combat. As an eminent writer has said, war is "not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed."[1] Similarly, the status of war may continue, notwithstanding that actual hostilities have ceased, until terminated in some way recognized by international law as sufficient for that purpose. Actual hostilities are usually terminated by the signing of an armistice or a capitulation, which may take the form of a protocol, or preliminary agreement, regulating the relations between the belligerents until the definitive treaty of peace shall have been signed and ratified.

There is no question that the President has power to bring about a suspension of hostilities on his sole authority. For example, actual hostilities were suspended in the Spanish-American war by the protocol of August 12, 1898 (which was not submitted to the Senate), and by Presidential proclamation of the same date.[2] But, as the Supreme Court pointed out, "a state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. 'A truce or suspension of arms,' says Kent, 'does not terminate the war, but it is one of the *commercia belli* which suspends its operations. . . . At the expiration of

[1] Moore's *Digest of Int. Law*, VII, 153.
[2] 30 Stat. at L., 1780.

the truce hostilities may recommence without any fresh declaration of war.'"[1] The Attorney-General of the United States took the same view, declaring that "notwithstanding the signing of the protocol and the suspension of hostilities, a state of war between this country and Spain still exists. Peace has not been declared and cannot be declared except in pursuance of the negotiations between the peace commissioners authorized by the protocol."[2] Moreover, a recognition of the continuation of the war in spite of the suspension of hostilities and the signing of the protocol was expressed in the definitive treaty of peace which, in the preamble, mentioned the desire of the two parties "to end the war *now existing* between the two countries."[3]

The principle thus upheld by the Supreme Court, by the Attorney-General, and by the treaty-making authority would seem to be too well established to be questioned. Nevertheless, during the prolonged delay which followed the armistices with Germany and Austria-Hungary in November, 1918, arising from the failure of the President and Senate to agree upon the terms of a definitive treaty, there was some doubt whether our status after the suspension of hostilities was one of war or one of peace. Diplomatic relations with the Central Powers continued severed, but commercial relations with Germany were to some extent resumed.[4] In transmitting the terms of the armistice to Congress on November 11, 1918, President Wilson made the statement that "the war thus comes to an end, for having accepted these terms of the armistice it will be impossible for the German command to renew it." He, however, could hardly have meant that the war had been legally terminated. For practical purposes, actual warfare by the Central

[1] Hijo *v.* United States, 194 U. S., 315, at p. 323.
[2] 22 *Op. U. S. Atty.-Gen.*, 191. (Aug. 24, 1898). For qualification of the latter part of the Attorney-General's statement, see below, p. 331.
[3] Malloy, *Treaties, etc.*, II, 1690.
[4] Limited intercourse with the enemy may be permitted, even during hostilities, by act of Congress prescribing the conditions under which it may be carried on. Hamilton *v.* Dillin, 21 Wall., 73.

Powers was at an end; but a state of war, as he well knew, still existed.

Curiously, however, the declaration was construed by a lower federal court as equivalent to an official proclamation of the end of the war. The question before the court involved the construction of a provision of a measure passed by Congress in 1917 making certain acts criminal if committed "during the present war." The court declined to enforce the penalty prescribed, on the ground that the war had ended upon the announcement of the President.[1]

This, however, does not seem to have been a well-considered decision. Even if the President's statement was intended as an official proclamation of the legal end of the war, it is somewhat doubtful whether that official could thus, by his sole act, upon the mere signing of the armistice, bring the war to a legal termination. The Supreme Court seems to have held that the Civil War was ended in different states on different dates by Presidential proclamation.[2] It is not clear that if Congress had, by act or joint resolution, adopted a different date as the end of the Civil War from that mentioned in the President's proclamation, the court would not have followed the determination of Congress rather than that of the President. It, however, continued a certain rate of pay to soldiers in the army "for three years after the close of the rebellion, as announced by the President" in his proclamation,[3] thereby adopting the date which the President had fixed; and in other cases than the one cited the Supreme Court seems to take the actions of both the President and Congress into consideration in determining the date at which the Civil War ended.[4]

[1] U. S. *v.* Hicks, 256 Fed., 707 (1919).
[2] The *Protector*, 12 Wall., 700; 14 Stat. at L., 811, 814.
[3] 14 Stat. at L., 422.
[4] U. S. *v.* Anderson, 9 Wall., 56, 70; McElrath *v.* U. S., 102 U. S., 438; Lamar *v.* Browne, 92 U. S., 187. In the Anderson case the court said: "As Congress, in its legislation for the army has determined that the Rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question wherever private rights are affected by it."

Even though it should be held that the proclamation of the President alone was sufficient to terminate the Civil War, it is to be remembered that that war, although partaking in some respects of the characteristics of a war between independent states, was fundamentally a contest for the suppression of a domestic insurrection, ending in the overthrow of the insurrectionary government. Hence the method to be pursued in determining the date of its conclusion might be different from that to be followed in the case of a foreign war in which the foreign belligerent still has a government in existence at the termination of hostilities. At all events, as indicated above, in the case of the armistices with the Central Powers the President's announcement to Congress is not to be regarded as an official proclamation of the legal termination of the war.

Congress, indeed, gave abundant evidence that it did not consider the signing of the armistices of 1918 and the accompanying announcement by the President to have brought the war to a legal termination. Thus, after the armistices, Congress passed, and the President approved, the War-time Prohibition Act, which made illegal the sale of distilled spirits for beverage purposes "after June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President."[1] The validity of this act was attacked in the Supreme Court on the ground, among others, that demobilization had been effected, that the war had been concluded, and that thereby the war emergency upon which the operation of the measure had been predicated was removed. The court, however, denied the contention and upheld the act's validity and continued operation. "In the absence," it said, "of specific provisions to the contrary the period of war has been held to extend to the ratification of the Treaty of Peace or the

[1] 40 Stat. at L., 1045, 1046.

proclamation of peace. . . . 'Conclusion of the war' clearly did not mean cessation of hostilities, because the act was approved ten days after hostilities had ceased upon the signing of the armistice. Nor may we assume that Congress intended by that phrase to designate the date when the Treaty of Peace should be signed at Versailles or elsewhere by German and American representatives, since by the Constitution a treaty is only a proposal until approved by the Senate." The court also held that the President's statement that "the war thus comes to an end" was meant in a popular sense and not as an official proclamation of the war's termination.[1]

Numerous other acts passed during the war provided that they should remain in force until the termination of the war or until varying lengths of time thereafter. Thus in the Trading with the Enemy Act of 1917 it was provided that "the words 'end of the war' as used herein shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this act." [2] Corresponding provisions of other war-time measures agree with this one in indicating that Congress expected the war to end normally with a treaty of peace, yet apparently considered that it might be terminated at a prior date by Presidential proclamation. It is not to be inferred, however, that Congress necessarily intended to intimate that a foreign war could be terminated by mere Presidential proclamation without a treaty of peace. The actions mentioned merely determined the period during which certain pieces of legislation should remain in force, and had no direct bearing on the termination of the war in an international sense.

[1] Hamilton *v.* Kentucky Distilleries and Warehouse Co., 251 U. S., 146.
[2] 40 Stat. at L., 412.

TERMINATION BY TREATY OF PEACE

The normal and usual method of ending war between nations is a formal treaty of peace. The wars in which the United States has been engaged have been almost invariably terminated in this way. In the case of the Spanish-American War, as indicated above, the definitive treaty of peace was preceded by a preliminary agreement, which also included the armistice, providing for the suspension of hostilities. In the cases of the War of 1812 and the Mexican War there was no armistice or preliminary agreement, and the definitive treaty of peace was signed while hostilities were still in progress. Even in the cases of the wars with the Barbary states, in which, as we have seen, no formal declarations of war were issued by the United States, treaties of peace were negotiated. The warlike operations between the United States and France in 1798 did not constitute a full-fledged war, and the treaty of 1800 by which amicable relations between the two countries were restored was not, speaking strictly, a treaty of peace. Most of the treaties of peace to which the United States has been a party mention in the preamble the desire of the parties to end the war existing between them. The French treaty of 1800, however, merely speaks of the desire of the parties "to terminate the differences" which have arisen between them.[1]

While it is commonly recognized that a treaty of peace is the normal method of terminating an international war, the question may be raised whether it is the only method which the United States can employ. Good authorities have sometimes declared to this effect. Thus in the course of his opinion in the case of Ware *v.* Hylton, Justice Chase said: "A war between two nations can only be concluded by treaty."[2] Again, Senator Lodge, chairman of the Foreign

[1] Malloy, *Treaties*, etc., I, 496.
[2] 3 Dall., 236.

Relations Committee, said on the floor of Congress: "Peace can be made only by the President and Senate."[1] These statements, however, were *obiter* and cannot be accepted as conclusive. Merely because all of the foreign wars in which the United States has been engaged hitherto have been ended by treaty, it does not follow that there is no other possible method.

Three ways are commonly recognized in international law in which war may be terminated. A recent writer, in beginning a treatise on the subject, states them as follows: "(1) by a mere cessation of hostilities on both sides, without any definite understanding supervening; (2) by the conquest and subjugation of one of the contending parties by the other, so that the former is reduced to impotence and submission; (3) by a mutual arrangement embodied in a treaty of peace, whether the honors of war be equal or unequal."[2]

TERMINATION BY CONQUEST OR CESSATION OF HOSTILITIES

It has sometimes been questioned whether the United States is empowered to terminate war by the conquest and subjugation of the enemy. The doubt is based upon a statement by Chief Justice Taney in the case of Fleming *v.* Page in which he said: "The genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandisement. . . . A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country."[3] In the same opinion, however, the Chief Justice admits that, by the laws and usages of nations,

[1] Cong. Record, April 21, 1914, vol. 51, p. 6965.
[2] Coleman Phillipson, *Termination of War and Treaties of Peace*, 3.
[3] 9 How., 603, 614.

conquest is a valid title; and it has been recognized by the Supreme Court that the United States has all powers in international relations that other sovereign and independent nations have.[1] Certainly the courts would not interfere if the United States should prosecute a duly declared foreign war to the extent of subjugating the enemy and overthrowing his government.[2]

We have sometimes taken the ground, furthermore, that a war has been terminated by a mere cessation of hostilities. In 1868, when hostilities between Spain and Peru had ceased for several years without a treaty of peace, and when the United States offered to sell some warships to Peru, Spain protested on the ground that such action would violate our neutrality, since there was still a status of war. Secretary Seward, however, denied the Spanish contention, on the ground that the war had ended. "It is certain," he said, "that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made."[3]

In case the United States should be a party to a war resulting in the complete subjugation of the enemy and the overthrow of his government, or in the cessation of hostilities for a sufficient length of time to indicate that there was no intention of renewing them, there would be no formal treaty of peace, and the question would arise as to where, in our Government, the power to declare peace resides. When war is ended by treaty, the treaty is primarily a contract or bargain between the powers concerned, and is recognized as binding in international law if no duress has been exercised against the negotiators. Furthermore, in the United States a treaty is a part of the supreme law of the land, and is therefore a legal method

[1] Fong Yue Ting *v.* U. S., 149 U. S., 698.
[2] Cf. Luther *v.* Borden, 7 How., 1.
[3] *Dip. Cor.* 1868, II, 32, quoted in Moore, *Digest of Internat. Law*, VII, 336.

of ending war. Subjugation of the enemy and long cessation of hostilities, however, are facts and not laws, although legal inferences and conclusions may be built upon them. The question is, What branch or authority in our Government is competent to establish the legal inference that, as the result of such facts, the war is ended and peace is restored?

The Constitution contains no specific grant of power to any branch of the Government to make peace. The matter came up for discussion, however, in the Philadelphia convention on August 17, 1787, in connection with the power to make war. Pinckney was in favor of vesting the power to make war in the Senate and remarked that "it would be singular for one authority to make war and another peace," thus indicating his belief that the power to make treaties, which at that stage in the proceedings was vested in the Senate alone, included the power to make peace.[1] This view was held also by Ellsworth, who declared that "there is a material difference between the cases of making war and making peace. It should be more easy to get out of war than into it. War also is a simple and overt declaration, peace attended with intricate and secret negotiations." Mason also was for "clogging rather than facilitating war; but for facilitating peace." When, therefore, it was moved to add "and peace" after "war," so as to give Congress as a whole the power to declare both war and peace, it was unanimously voted down.[2]

These proceedings, together with those which took place in connection with the consideration of the treaty-making power, indicate that the convention assumed that there was no such similarity in the methods to be pursued in declaring war and in making peace as to require that both powers should be vested in the same branch of government. While the convention assumed that the power to make treaties

[1] *Journal of the Constitutional Convention* (Hunt ed.), II, 188.
[2] *Ibid.*, 189.

includes the power to make peace, it did not exclusively vest the latter power by an express grant in any branch of the Government, nor did it expressly deny such power to Congress. It may be that the members felt that if Congress were given the power to make peace, such a grant would be likely to be construed as exclusive, with the result that peace could not be made by the treaty-making power and *vice versa*. There is nothing, however, to indicate that the convention ever gave thought to the mode of procedure in two quite possible situations: first, where a war has resulted in the subjugation of the enemy and the overthrow of his government, so that no functionaries exist with which a treaty can be made, and second, where hostilities have long since ceased and the treaty-making power is impotent to conclude peace on account of an apparently irreconcilable difference of opinion between the President and the Senate over the terms of the treaty. Had these contingencies been considered, it is not clear that the convention would not have vested the power to declare peace, at least under such circumstances, in some body other than the treaty-making authority.

THE CONGRESSIONAL PEACE RESOLUTION

Procedure in the second of these two contingencies recently became a matter of practical importance on account of the failure of the President and the Senate, for a long time, to agree upon the terms of a treaty of peace with Germany. In view of the deadlock between the parts of the treaty-making authority, Congress essayed to take the initiative in restoring peace by passing, in May, 1920, a joint resolution which reads in part as follows: "That the joint resolution of Congress passed April 6, 1917, declaring a state of war to exist between the Imperial German Government and the Government and people of the United States, and making provisions to prosecute the same, be,

and the same is hereby, repealed, and said state of war is hereby declared at an end."[1] This resolution was promptly vetoed by President Wilson. In July, 1921, however, Congress passed another joint resolution declaring peace, and President Harding as promptly approved it. The latter resolution was of similar tenor to the former one, but instead of expressly repealing the resolution of April, 1917, declaring war, it merely announced that such state of war was "hereby declared at an end."[2]

The question of the power of Congress to declare peace after a foreign war, not having before arisen in a practical form, had been given comparatively little attention. There had been, however, some expressions of opinion, even if apparently contradictory. Hare, in his work on the Constitution, says: "It is the right of the President, and not of Congress, to determine whether the terms [of peace] are advantageous, and if he refuses to make peace, the war must go on."[3] Similarly, in the report of the Judiciary Committee of the forty-ninth Congress on the treaty power, made by John Randolph Tucker, it is stated that "Congress cannot create the status of peace by repealing its declaration of war, because the former requires the concurrence of two wills, the latter but the action of one."[4] In his commentaries on the Constitution, however, Tucker says: "Is there no end to the war except at the will of the President and Senate? No authority can be cited on the question, but the writer thinks a repeal of a law requiring war would be effectual to bring about the status of peace in place of war."[5] Judge Baldwin appears to be of the same opinion. "Peace," he says, "could no doubt also be restored by an act of Congress. As a declaration of war takes the shape with us of a statute, it would seem that it

[1] Cong. Record, May 15, 1920, vol. 59, p. 7680.
[2] *Ibid.*, July 1, 1921, vol. 61, p. 3454.
[3] J. I. C. Hare, *American Constitutional Law*, I, 171-2.
[4] Quoted in H. St. G. Tucker, *Limitations on the Treaty-Making Power*, 357.
[5] Tucker, *The Constitution of the United States*, II, 718.

can be repealed by a statute."[1] A similar conclusion is reached by Whiting, who says: "As it is in the power of the Legislative Department to declare war, and to provide or withhold the means of carrying it on, Congress also may, after hostilities shall have ceased, declare or recognize peace."[2]

These statements, while differing, are capable of being, at least to some extent, reconciled. Tucker, in the report cited, and Hare, are evidently speaking of a negotiated peace, which Congress admittedly cannot make, since it has no means of carrying on *pourparlers* directly with a foreign government. In the exercise of its power to regulate foreign commerce, or in the exercise of some other granted power, Congress can pass a law embodying proposed terms of peace and can make the operation of such law contingent upon the consent of the enemy government being secured to such terms. But the communication of the terms to the enemy and the notification by the enemy of its acceptance must be transmitted through the President, and such offer and acceptance would constitute an international agreement, if not a treaty. In his treatise on the Constitution, Tucker does not specify the sort of peace of which he is speaking; nor does Baldwin; and their statements, in the unqualified form in which they appear, cannot be accepted as invariably true. The determination of the question is dependent on collateral facts and circumstances, which vary in different cases. Whiting's statement, although general in form, doubtless refers primarily to the case of a civil war. Moreover, he does not assert the power of Congress to create a status of peace, but merely to declare or recognize the existence of peace after hostilities shall have ceased.

The concurring will to peace of the erstwhile enemy may be indicated, without formal notification, by reciprocal and

[1] Baldwin in *Am. Jour. of Internat. Law*, XII, 13-14 (Jan., 1918).
[2] Whiting, *War Powers Under the Constitution* (43rd ed.), 312.

extended intermission of hostilities, especially if evidenced by some positive action that there is no intention to renew them. It would hardly be maintained that Congress could end a foreign war by declaring peace while the war is being actively waged on both sides. Congress, of course, cannot appropriate funds for the support of the army for a longer period than two years, and it might withhold or limit appropriations for this purpose, whether hostilities are in progress or not, thereby tying the hands of the President in prosecuting a war and compelling him to sue for peace. Such action, however, would not end the war as a matter of legal status.

The passage of a peace resolution by Congress, based on the assumption that the former enemy has no intention of further prosecuting hostilities, would indicate a similar absence of intention on the part of our Government, in so far as Congress can determine our policy in such a matter, and would have weight as coming from that branch of the Government whose action and coöperation are necessary not only for the declaration of war but also for its vigorous prosecution. The passage of such a resolution would indicate that, so long at least as Congress remained of the same mind, funds for the further prosecution of the war would not be forthcoming. If coupled with the continued cessation of hostilities by the former enemy, it would constitute a concurrent undertaking to terminate the war without terms. It would not, however, preclude the subsequent making and ratification of a treaty defining the terms of peace. The concurrent undertaking to terminate the war might be only tacit, if the cessation of hostilities should be sufficiently continued; or the intention not to renew them might be indicated by positive action. In the case of the attempt to terminate the war with Germany, the undertaking of that power not to renew hostilities was evidenced by its ratification of the treaty of Versailles, which itself provided that, upon its coming into force (after ratification

by Germany and three of the allied and associated powers), the state of war should terminate. In spite of this provision, the state of war between the United States and Germany continued, in the absence of ratification by the United States. But, even so, the war could doubtless have been terminated, without a treaty, by a similar concurrent undertaking on the part of the United States not to renew hostilities, as evidenced by a joint resolution of Congress.

A state of war may exist before it is formally declared by Congress. It has been customary for Congress not to declare war directly, but to recognize by declaration the existence of a state of war brought on by the acts of the foreign government against which the declaration is directed. The Constitution does not specifically give Congress the power to recognize the existence of a state of war, but it will not be denied that this power is implied and included in the power to declare war. Hence it may be argued that Congress has the implied power to recognize by declaration a state or condition in which war has in fact ceased, due to the long cessation of hostilities or to the complete subjugation of the enemy. Even though such a declaration might be regarded as having no international effect, it would still have domestic force with reference to the rights and duties of our citizens. Such a determination by Congress, as we have seen, has been recognized by the Supreme Court as having weight in a domestic sense in the case of our Civil War.[1] If the Confederacy had been successful, the Civil War would doubtless have been terminated by a treaty of peace. As it was, the method of termination probably differed but little from that which would be followed in the case of a foreign war in which the United States should completely subjugate the enemy and overthrow his government.

The ground upon which the power of Congress to declare peace is usually based is the power to repeal any act or

[1] U. S. *v.* Anderson, 9 Wall., 71.

resolution which the body has power to pass. Thus it has been said that "Congress has the right, simply by virtue of its power to repeal its previous enactments, to declare hostilities with Germany to be at an end, and its declaration to this effect, once duly enacted, will be binding upon the Courts and the Executive alike."[1] It does not necessarily follow, however, from the mere fact that Congress by act or joint resolution can create a status of war, that it can restore peace by a simple repeal of its former act. This seems to have been tacitly admitted by the framers of the Congressional peace resolution of 1920, which not only provided for the repeal of the previous declaration of war but expressly declared the state of war thereby created to be at an end. They thus assumed to exercise the power, not only to recognize the existence of peace by repealing the declaration of war, but also to create a status of peace by Congressional resolution. Without doubt, Congress can repeal its declaration of war. But the question is, Does such repeal operate to restore peace? In the Hicks case, cited above, in which it was contended that since Congress alone can begin war, it alone can terminate it, the court said: "But that does not follow, because the Constitution, while in express terms giving Congress the sole power of declaring war, in no way so expresses itself as to give that body any authority itself to terminate it."[2] Congress can pass an act or joint resolution admitting a state into the Union. But it would hardly be maintained that, after a state has once been admitted, Congress could expel it by a simple repeal of the act admitting it. Similarly, Congress can by resolution propose a constitutional amendment to the state legislatures for ratification. But when the proposed amendment has been transmitted to the legislatures the power of Congress over the matter is at an end.[3] These

[1] E. S. Corwin, "The Power of Congress to Declare Peace," *Mich. Law. Review*, XVIII, 674 (May, 1920).
[2] U. S. *v.* Hicks, 256 Fed., 707.
[3] Jameson, *The Constitutional Convention* (1st ed.), p. 505, sect. 549.

illustrations, however, merely indicate that Congress cannot always undo that which it has the power to do; they do not necessarily prove that it cannot restore peace by the repeal of a declaration of war.

Light on the question as to the power of Congress to restore peace may perhaps be drawn by analogy from the power to acquire new territory. This power also is not expressly granted in the Constitution to any branch of the government. It has been implied from the power to make war and to make treaties,[1] and may also be derived from the principle that, in its international relations, the United States has such powers as international law recognizes in states generally. The usual method of acquiring territory has been by treaty. However, this plan has been followed only when there was a ceding power with which a treaty could be made and which continued to exist as an independent government after the annexation of the transferred territory to the United States. Texas and Hawaii were acquired by joint resolution of Congress. In both of these cases there was no government with which to make a treaty except the government of the territory annexed, which ceased to have an independent existence at the moment of annexation. Texas was annexed in pursuance of the express grant to Congress of the power to admit new states into the Union. But Hawaii was not admitted as a state, and its annexation represents a greater extension of Congressional power.

Another example of the acquisition of territory by Congress is found in the operation of the guano island act of 1856, which provides that when any citizen of the United States shall discover a guano island not occupied by the citizens of any other government and not within the lawful jurisdiction of any foreign country, and shall take peaceable possession of the same, such island may, at the discretion of the President, be considered as belonging to the

[1] American Insurance Co. *v.* Canter, 1 Pet., 511.

United States.[1] The validity of this act was tested in the Supreme Court, and that tribunal found ample warrant for the measure in the principle that, by international law, territory may be acquired by discovery or occupation, as well as by cession or conquest, and that when citizens of a nation take possession of unoccupied territory, the nation to which such citizens belong may exercise such jurisdiction as it sees fit over the territory so acquired.[2]

Thus the power of Congress to acquire territory by statute or joint resolution is recognized as proper where there is no foreign government with which a treaty can appropriately be made. The same distinction would be followed in case of the alienation of territory. If territory were to be alienated to a foreign power, it would seem that the treaty method would have to be adopted. But if the alienation should take the form of a grant of independence to a particular portion of the country, the appropriate method would be by statute or joint resolution.[3] Similarly, in the case of making peace, it would seem that when the United States subjugates the enemy and overthrows his government, it becomes the function of Congress by act or joint resolution to declare peace, since there is no government with which to make a treaty. Also, in the case of a prolonged cessation of hostilities (since this is recognized by international law as a method of ending war, if there is no intention of renewing such hostilities) the evidence of lack of intention on our part to resume hostilities might, if predicated on sufficient evidence of a similar lack of intention on the part of the former enemy, be given by Congressional act or joint resolution.[4] It has been objected that, if Congress can declare peace, it can pass a law to bring

[1] 11 Stat. at L., 119.

[2] Jones *v.* United States, 137 U. S., 202.

[3] Willoughby, *Constitutional Law of the United States*, I, 513.

[4] Congress could obviously not take such action by concurrent resolution, since this would be an attempt to exclude the President from an act of a legislative character. The joint resolution could be passed over the President's veto, but the President could still prevent the full return of normal peace conditions by refusing to resume diplomatic relations.

the troops home, and thus interfere in the direction of the army in the midst of a campaign.[1] This does not necessarily follow. But even if it did so, the difficulty would be largely avoided by confining the power of Congress to declare peace to the two contingencies mentioned. Where, however, the government of the enemy has not been overthrown, nor have hostilities ceased for so long a time as to indicate that there is no intention of renewing them, the only appropriate way of ending war is by the exercise of the treaty power. Even if the treaty method is followed, the exact date of termination, so far as its domestic effect is concerned, may be determined by the President, since a treaty of peace is put into effect in a domestic sense by Presidential proclamation; and the date of termination as fixed in such proclamation need not correspond with the date of the exchange of ratifications of the definitive treaty of peace.

TERMINATION BY PRESIDENTIAL PROCLAMATION

If in either of the two contingencies mentioned, *i.e.*, the overthrow of the enemy's government and a prolonged cessation of hostilities, Congress fails to act, can the President bring the war to an end by proclamation? In August, 1919, Senator Fall, of New Mexico, propounded the following question to President Wilson: "In your judgment, have you not the power and authority, by a proclamation, to declare in appropriate words that peace exists and thus restore the status of peace between the Government and people of this country and those with whom we declared war?" The President's reply was: "I feel constrained to say . . . not only that in my judgment I have not the power by proclamation to declare that peace exists, but that I could in no circumstances consent to take such a course

[1] Speech of Mr. Connally in House of Representatives, Cong. Record, April 8, 1920, vol. 59, p. 5773.

prior to the ratification of a formal treaty of peace."[1] In view of the fact that neither of the two conditions in which Congress can declare peace then existed, as well as because the treaty of peace pending in the Senate had been neither ratified nor rejected by that body, there seems to be no reason to question the correctness of the President's answer. But if either of these two conditions had existed, there would have been some ground to believe, by analogy with the method of ending the Civil War, that the President had the power in question, although, as already indicated, the matter is involved in some doubt. In one case, as we have seen, the Supreme Court seemed to consider the dates of the termination of the Civil War as depending on the proclamations of the President, without taking into account the concurrent action of Congress.[2] The dates chosen by the President were, however, sanctioned by a subsequent act of Congress; and the Supreme Court, in other cases, seems to have considered the action of Congress as of substantial, if not controlling, weight in determining the end of the Civil War.[3] The situation with reference to the power in question seems analogous to that existing with regard to the power to permit limited intercourse with the enemy in time of war. In each case, it would seem that the President alone may exercise the power, although probably not against the expressed will of Congress; but, whether so or not, he may exercise it with the concurrent authority of Congress.[4] In the absence of any conflicting action on the part of Congress, the courts would doubtless consider themselves bound, in determining private rights,

[1] Cong. Record, Aug. 22, 1919, pp. 4434, 4435.
[2] The *Protector*, 12 Wall., 700.
[3] U. S. *v.* Anderson, 9 Wall., 71.
[4] Hamilton *v.* Dillin, 21 Wall., 73. In this connection it may be pointed out that certain war-time acts of Congress indicate that in the opinion of that body the President alone, by proclamation, can at least recognize the termination of war for the purpose of indicating the period during which such legislation shall operate. See, *e.g.*, 40 Stat. at L., 412.

by the President's proclamation; in the case of the *Protector,* the Supreme Court avowedly considered itself so bound, "in the absence of more certain criteria, of equally general application."[1]

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[1] 12 Wall., 700.

CHAPTER XVIII

CONCLUSION

IN providing for the conduct of foreign relations the framers of our Constitution were guided by two main motives or attitudes: (1) high regard for the principle of separation of powers, and (2) jealousy of arbitrary executive power as exemplified in old-world institutions. Hamilton pointed out in the Federalist that the king of Great Britain was "the sole and absolute representative of the nation in all foreign transactions." The founders of our republic, however, had no intention to make the President a dictator in foreign relations. They were men of sufficient practical acquaintance with public affairs to know that the chief executive must be given a large measure of control in this field. None the less, they rigorously applied the principle of checks and balances by requiring the concurrence of the Senate both in treaty-making and in diplomatic appointments. Moreover, they deemed it wise that in the determination of peace or war the direct representatives of the people should have such a degree of control that no declaration of war could be issued without their consent. This was at the time a striking innovation, an arrangement paralleled nowhere in Europe, and it apparently represented the establishment of a broadly democratic basis for that phase of our foreign relations which touches the interests of the whole people most closely.

Despite the theory of the Constitution, as thus outlined, the President has, in practice, assumed a degree of power which is almost tantamount to a dictatorship in the conduct of foreign relations. It is true that he is not absolute, and that in the pursuit of his foreign policies he sometimes re-

ceives notable rebuffs. The principal check upon his control is the power of the Senate in treaty-making, which has not infrequently been so employed as to interfere with his purposes, or even to thwart them completely. None the less, the President may evade this check by making international agreements which are not submitted to the Senate; he may get around the constitutional requirement of Senatorial confirmation of his diplomatic appointments by appointing special diplomatic agents on his sole authority; and in practice he has so largely assumed the initiative in matters of war and peace that, as a rule, Congress merely ratifies the decision which he has reached.

Why has the theory of the Constitution been so far departed from in practice? The main reason is that the conduct of foreign relations is fundamentally an executive, rather than a legislative, function . By its nature as a continuous and unified organ the executive is better adapted to secure and exercise control in this field than a legislative body can be. It is true that the legislative power of appropriating the public funds carries with it here, as in other fields of governmental activity, an important and pervasive influence. But this influence is usually indirect. The powers of the President are direct, and they enable him to take and hold the initiative and to act with secrecy and dispatch when such methods are desirable. Moreover the President is in immediate touch with the sources of official information and is thus enabled to act with more adequate knowledge than can Congress, which is ordinarily dependent for information upon the action of the President in voluntarily transmitting it. The presidential office is thus fundamentally and intrinsically better adapted than a legislative body for the control of foreign relations; although the amount and kinds of control actually exercised vary from period to period, according partly to the urgency of foreign problems, partly to the personal prestige of the

incumbent of the office, and partly to the degree of political harmony, or the lack of it, between him and Congress.

Under the principle of separation of powers, the President and the two branches of Congress are largely independent one of another. Yet their concurrent action is frequently necessary to the performance of functions which, directly or indirectly, affect foreign relations. In order that, under these circumstances, foreign affairs may be conducted without friction or deadlock, it is highly desirable, and almost necessary, that the relations of these coördinate organs of the government be permeated with a spirit of comity. The power and the responsibility, however, rest largely with the President. He is not responsible to Congress in the sense that the executive is responsible to the legislature in European parliamentary governments. His responsibility is rather to the people, from whom all power and authority are ultimately derived, and to whom an accounting for his official stewardship must finally be made.

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